

EMERGENCY ADOPTION

LABOR AND WORKFORCE DEVELOPMENT

DIVISION OF WAGE AND HOUR COMPLIANCE

Prohibited COVID-19 Related Employment Discrimination

Adopted Emergency New Rules and Concurrent Proposed New Rules: N.J.A.C.

12:70

Emergency New Rules Adopted and concurrent Proposed New Rules Authorized:

XXXX by Robert Asaro-Angelo, Commissioner, Department of Labor and Workforce Development.

Filed: April 1, 2020, as R.2020 d.053.

Gubernatorial Approval: March 31, 2020.

Authority: P.L. 2020, c. 9.

Calendar Reference: See the notice introduction below for explanation of exception to calendar requirement.

Concurrent Proposal Number: PRN 2020-051.

Emergency New Rules Effective Date: April 1, 2020.

Emergency New Rules Expiration Date: May 31, 2020.

Submit written comments by May 20, 2020, to:

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These new rules are adopted on an emergency basis and became effective upon acceptance for filing by the Office of Administrative Law (see N.J.S.A. 52:14B-4(c) and N.J.A.C. 1:30-6.5(b)). Concurrently, the provisions of these emergency new rules are being proposed for readoption in accordance with the normal rulemaking requirements contained in the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq. The readopted new rules become effective upon acceptance for filing by the Office of Administrative Law (see N.J.A.C. 1:30-6.5(d)), if filed on, or before, the expiration date of the emergency new rules.

As this rulemaking involves an imminent peril subject to provisions of N.J.S.A. 52:14B-4(c), it is excepted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a)3.

The emergency adopted new rules and concurrently proposed new rules follow:

Summary

The emergency adopted and concurrently proposed new rules at N.J.A.C. 12:70 will implement P.L. 2020, c. 9 (the Act), which, during the Public Health Emergency and State of Emergency declared by the Governor in Executive Order No. 103 (2020) concerning the coronavirus disease 2019 (COVID-19) pandemic, prohibits an employer from terminating or otherwise penalizing an employee, if the employee requests or takes time off from work based on the written or electronically transmitted recommendation of a medical professional licensed in New Jersey that the employee take that time off for a specified period of time because the employee has, or is likely to have, an infectious disease, which may infect others at the employee's workplace.

Under the Act, an aggrieved employee may file a complaint with the Commissioner of the Department of Labor and Workforce Development (Department) or directly with the Superior Court.

Emergency adopted and concurrently proposed new N.J.A.C. 12:70-1.1 sets forth the purpose and scope of the chapter.

Emergency adopted and concurrently proposed new N.J.A.C. 12:70-1.2 includes definitions of words and terms used throughout the chapter. Among the terms defined in the new chapter are “protected leave,” which will mean leave from work taken by an employee during the Public Health Emergency and State of Emergency declared by the Governor in Executive Order No. 103 (2020) concerning the COVID-19 pandemic, based on the written or electronically transmitted recommendation of a medical professional licensed in New Jersey that the employee take that time off for a specified period of time because the employee has, or is likely to have, an infectious disease that may infect others at the employee’s workplace. The new chapter also defines the following terms: “Act,” “Commissioner,” “Department,” “employ,” “employee,” “employer,” “infectious disease,” and “medical professional licensed in New Jersey.”

Emergency adopted and concurrently proposed new N.J.A.C. 12:70-1.3 states that upon the expiration of a period of protected leave, an employee must be restored to the position such employee held immediately prior to the commencement of the protected leave, with no reduction in seniority, status, employment benefits, pay, or other terms and conditions of employment; however, the new section also states that if such position has been filled, the employer must reinstate the employee returning from protected leave to an equivalent position of like seniority, status, employment benefits,

pay, and other terms and conditions of employment. Finally, the new section addresses those instances in which an employment action may not be retaliatory under the Act, even though the employee is on a protected leave. This may occur if: (i) the employer conducts a reduction in force that would have affected the employee had that person been at work; or (ii) the employee would have been impacted by the good faith operation of a bona fide layoff and recall system, including a system under a collective bargaining agreement that would not entitle the employee to reinstatement to the former or an equivalent position.

Emergency adopted and concurrently proposed new N.J.A.C. 12:70-1.4 prohibits an employer from discharging or in any way retaliating against or penalizing any employee because the employee requests or takes protected leave.

Emergency adopted and concurrently proposed new N.J.A.C. 12:70-1.5 lists the administrative remedies that are available to an employee who is aggrieved under the Act and the new chapter. These include reinstatement of the employee to employment in the position held when the protected leave commenced with no reduction in seniority, status, employment benefits, pay, and other terms and conditions of employment. Alternatively, if the employee's position has been filled, the employee is entitled to reinstatement to an equivalent position of like seniority, status, employment benefits, pay, and other terms and conditions of employment. Finally, if the employer is found to have violated the Act or this chapter, the employer is subject to an administrative penalty of \$2,500 for each violation.

Emergency adopted and concurrently proposed new N.J.A.C. 12:70-1.6 addresses complaints that are filed with the Commissioner (the Act also allows

aggrieved employees to file directly with the Superior Court). It states that any complaint filed with the Commissioner that alleges a violation of the Act or the new chapter will be processed in the same manner as a claim for wages filed with the Division of Wage and Hour Compliance, Wage Collection Section, within the Department, under N.J.S.A. 34:11-57 et seq. Under procedures for the processing of a claim for wages in the Wage Collection Section, there is a hearing conducted by a Wage Collection Referee. At that hearing, the employer may be summoned, witnesses subpoenaed, oaths administered, testimony taken. Following the hearing, the Wage Collection Referee is empowered to issue a decision and order appropriate remedies. The new rule states that any hearings of the Division of Wage and Hour Compliance, Wage Collection Section, under this chapter, may be conducted remotely with the assistance of technology, such as telephone, web-based video conferencing, and submission of documentary evidence by email or text. The Division of Wage and Hour Compliance already has the flexibility to conduct wage collection hearings remotely under existing law and rules; however, since N.J.A.C. 12:70 is being promulgated in order to address a circumstance directly related to COVID-19, the Department has determined that inclusion of this subsection on the conduct of hearings remotely will reduce the potential for confusion about the process.

Emergency adopted and concurrently proposed new N.J.A.C. 12:70-1.7 states that any appeal from a judgment of the Division of Wage and Hour Compliance, Wage Collection Section, under the Act and the new chapter will follow the procedure set forth at N.J.S.A. 34:11-63. That is, the judgment of the Wage Collection Referee may be appealed to the Superior Court by either party, upon filing a notice of appeal with the

Division of Wage and Hour Compliance, Wage Collection Section, within 20 days of the judgment having been issued.

Emergency adopted and concurrently proposed new N.J.A.C. 12:70-1.8 states that the criteria in the Unemployment Compensation Law at N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), commonly referred to as the “ABC test,” and the case law interpreting and applying the ABC test to potential employment relationships will be used to determine whether the complainant is an employee or an independent contractor under the Act and the new chapter.

Social Impact

The emergency adopted and concurrently proposed new rules would have a positive social impact in that they, along with the Act, would during the Public Health Emergency and State of Emergency declared by the Governor in Executive Order No. 103 (2020) concerning the COVID-19 pandemic, protect employees from termination or the imposition of other penalties by their employers when they must take time off from work based on the recommendation of a medical professional because they have, or are likely to have, an infectious disease that may infect others at the employee’s workplace. This is beneficial for the protected employee, but also for the public in general, since during this unprecedented public health crisis everyone benefits when those who are sick stay at home, rather than come to work, thereby slowing the spread of the virus and protecting the State’s health care facilities from becoming overwhelmed. Furthermore, the 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 new rules establish a regulatory framework for the ordering

of reinstatement and assessment of penalties and the processing of appeals where a violation of the Act has occurred, thereby enabling the Department to effectively enforce the law.

Economic Impact

That portion of the new rules that address the levying of penalties by the Department against those who violate the Act would, of course, have a negative economic impact upon those employers who run afoul of the Act. 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 that might otherwise result.

Federal Standards Statement

A Federal standards analysis is not required because the new rules are not subject to any Federal standards or requirements. Specifically, the new rules are governed by P.L. 2020, c. 9, a State statute. Accordingly, no Federal standards analysis is required.

Jobs Impact

It is not anticipated by the Department that the new rules will result in the generation or loss of jobs.

Agriculture Industry Impact

The Department does not anticipate that the new rules would have an impact on the agriculture industry.

Regulatory Flexibility Analysis

The new rules would impose no new reporting, recordkeeping, or compliance requirements on small businesses as that term is defined within the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The new rules would simply provide the regulatory framework for enforcement by the Department of P.L. 2020, c. 9. Accordingly, a regulatory flexibility analysis is not required.

Housing Affordability Impact Analysis

The new rules would not evoke a change in the average costs associated with housing or the affordability of housing. The basis for this finding is that the new rules pertain only to the enforcement of P.L. 2020, c. 9. The new rules do not pertain to housing.

Smart Growth Development Impact Analysis

The new rules would not evoke a change in the housing production in 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 only to enforcement by the Department of P.L. 2020, c. 9. The 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.

Full text of the emergency adopted and concurrently proposed new rules follows:

CHAPTER 70

PROHIBITED COVID-19 RELATED EMPLOYMENT DISCRIMINATION

SUBCHAPTER 1. GENERAL PROVISIONS

12:70-1.1 Purpose and scope

(a) The purpose of this chapter is to effectuate P.L. 2020, c. 9, which, during the Public Health Emergency and State of Emergency declared by Governor Murphy in Executive Order No. 103 (2020) concerning the coronavirus disease 2019 (COVID-19) pandemic, prohibits an employer from terminating or otherwise penalizing an employee, if the employee requests or takes time off from work based on the written or electronically transmitted recommendation of a medical professional licensed in New Jersey that the employee take that time off for a specified period of time because the employee has, or is likely to have, an infectious disease that may infect others at the employee's workplace.

(b) The chapter shall apply to employers and employees.

12:70-1.2 Definitions

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

“Act” means P.L. 2020, c. 9.

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

“Department” means the Department of Labor and Workforce Development.

“Employ” means to suffer or permit to work.

“Employee” includes any individual employed by an employer.

“Employer” includes any individual, partnership, association, corporation, and the State and any county, municipality, or school district in the State, or any agency, authority, department, bureau, or instrumentality thereof, or any person, or group of persons, acting directly or indirectly in the interest of an employer in relation to an employee.

“Infectious disease” means “infectious disease” as that term is defined at N.J.S.A. 26:13-2.

“Medical professional licensed in New Jersey” means a physician, physician assistant, advanced practice nurse, or registered nurse who is appropriately licensed by the State of New Jersey.

“Protected leave” means leave from work taken by an employee during the Public Health Emergency and State of Emergency declared by Governor Murphy in Executive Order No. 103 (2020) concerning the coronavirus disease 2019 (COVID-19) pandemic, based on the written or electronically transmitted recommendation of a medical professional licensed in New Jersey that the employee take that time off for a specified period of time because the employee has, or is likely to have, an infectious disease that may infect others at the employee’s workplace.

12:70-1.3 Reinstatement

(a) Upon expiration of a period of protected leave, an employee shall be restored to the position such employee held immediately prior to the commencement of the protected leave, with no reduction in seniority, status, employment benefits, pay, or other terms and conditions of employment. If such position has been filled, the employer shall reinstate such employee to an equivalent position of like seniority, status, employment benefits, pay, and other terms and conditions of employment.

(b) If, during a period of protected leave, the employer experiences a reduction in force or layoff and the employee would have lost the employee's position had the employee not been on leave, as a result of the reduction in force or pursuant to the good faith operation of a bona fide layoff and recall system including a system under a collective bargaining agreement, where applicable, the employee shall not be entitled to reinstatement to the former or an equivalent position. The employee shall retain all rights under any applicable layoff and recall system, including a system under a collective bargaining agreement, as if the employee had not taken the protected leave.

12:70-1.4 Prohibited retaliation

No employer shall discharge or in any way retaliate against or penalize any employee because such employee requests or takes protected leave.

12:70-1.5 Administrative remedies

(a) When the Commissioner finds that an employer has violated the Act, the Commissioner is authorized to order:

1. Reinstatement of the employee to employment in the position held when the protected leave commenced with no reduction in seniority, status, employment benefits, pay, and other terms and conditions of employment, or if such position has been filled, reinstatement of the employee to an equivalent position of like seniority, status, employment benefits, pay, and other terms and conditions of employment; and/or

2. The assessment of an administrative penalty against the employer of \$2,500 for each violation of the Act.

12:70-1.6 Processing of complaints

(a) Any complaint filed with the Commissioner that alleges a violation of the Act or of this chapter shall be processed in the same manner as a claim for wages filed with the Division of Wage and Hour Compliance, Wage Collection Section, within the Department pursuant to N.J.S.A. 34:11-57 et seq.

(b) Hearings of the Division of Wage and Hour Compliance, Wage Collection Section, under this chapter, may be conducted remotely with the assistance of technology, such as telephone, web-based video conferencing, and submission of documentary evidence by email or text.

12:70-1.7 Appeals

An appeal from a judgment of the Division of Wage and Hour Compliance, Wage Collection Section, under this chapter shall follow the procedure set forth at N.J.S.A. 34:11-63.

12:70-1.8 Independent contractor status

The criteria in the Unemployment Compensation Law at N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), commonly referred to as the “ABC test,” and the case law interpreting and applying the ABC test to potential employment relationships shall be used to determine whether the individual is an employee or an independent contractor under the Act and this chapter.