(a)

DIVISION OF FIRE SAFETY

Notice of Administrative Correction
Uniform Fire Code

N.J.A.C. 5:70-4.7

Effective Date: August 27, 2024.

Take notice that the Division of Fire Safety has discovered an administrative error at N.J.A.C. 5:70-4.7(i).

N.J.A.C. 5:70-4.7(i) requires Group R-1 occupancies, not already required to be suppressed throughout in accordance with N.J.A.C. 5:70-4.17, to have certain higher risk rooms to be equipped with a fire suppression or smoke detection system. Either system would require supervision, however the suppression system supervision provision cannot be provided through a section outside the scope of fire suppression systems. The inclusion of subsection (k) in the language provides the pathway for fire suppression system supervision. Additionally, N.J.A.C. 5:70-4.9(c)1, 2, and 3 were deleted from the New Jersey Administrative Code many years ago, therefore, this cross-reference will be updated to be N.J.A.C. 5:70-4.9(c) with other grammatical changes.

This notice of administrative correction is published pursuant to N.J.A.C. 1:30-2.7.

Full text of the corrected rule follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 4. FIRE SAFETY CODE

5:70-4.7 Fire suppression systems

(a)-(h) (No change.)

(i) In all buildings of Use Group R-1 or portions thereof when separated in accordance with (l) below, not required [by] **at** N.J.A.C. 5:70-4.17 to have a complete automatic fire suppression system, all storage and workshop rooms and rubbish, laundry**,** and similar rooms shall be equipped with a suppression system or smoke detector system connected to an approved continuously staffed location in the building or supervised [employing one of the methods identified] in **accordance with (k) below or** N.J.A.C. 5:70-4.9(c)[1 through 3]**, respectively**. Such systems shall be installed in accordance with the New Jersey Uniform Construction Code.

(j)-(l) (No change.)

HUMAN SERVICES

(b)

DIVISION OF FAMILY DEVELOPMENT

Notice of Administrative Change
Emergency Assistance Hotel and Motel Per Diem Rates

N.J.A.C. 10:90-6.7

Effective Date: August 14, 2024.

Take notice that, the State Fiscal Year (FY) 2025 appropriations act, P.L. 2024, c. 22, increased the Emergency Assistance Program per diem reimbursement rates for hotels and motels by $10.00 greater than the rates in effect during FY 2024. Therefore, the Division of Family Development (DFD) is changing N.J.A.C. 10:90-6.7 to reflect these increased reimbursement rates.

Full text of the changed rule follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 6. EMERGENCY ASSISTANCE

10:90-6.7 Payment for hotel or motel placements

The county or municipal agency shall issue payment for emergency housing provided in hotels and motels in accordance with the schedule of per diem rates as follows:

Emergency Assistance amounts per day

1 Person/1 room	[$62.00] **$72.00**
2 Persons/1 room	[$72.00] **$82.00**
3 Persons/1 room	[$87.00] **$97.00**
4 Persons/1 room	[$87.00] **$97.00**
4 Persons/2 rooms	[$117.00] **$127.00**
5 Persons/1 room	[$97.00] **$107.00**
5 Persons/2 rooms	[$117.00] **$127.00**

LABOR AND WORKFORCE DEVELOPMENT

(c)

DIVISION OF WAGE AND HOUR COMPLIANCE

Temporary Laborers
Adopted New Rules: N.J.A.C. 12:72

Proposed: August 21, 2023, at 55 N.J.R. 1804(a).
Adopted: August 21, 2024, by Robert Asaro-Angelo, Commissioner, Department of Labor and Workforce Development.
Filed: August 21, 2024, as R.2024 d.089, **with non-substantial changes** not requiring additional public notice or comment (see N.J.A.C. 1:30-6.3)**.**

Authority: N.J.S.A. 34:1-20, 34:1A-3.e, 34:8D-5.i, and 34:8D-10.c.
Effective Date: September 16, 2024.
Expiration Date: September 16, 2031.

Summary of Public Comments and Agency Responses:

Written comments were submitted by the following individuals:

1. Wendy Tordilio and Mike Menser, Co-Presidents, New Jersey Staffing Alliance, Mount Laurel, New Jersey.
2. Leslie Lejewski, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Morristown, New Jersey.
3. James McDonnell, Luke Breslin, Justin Cutlip, and Lena Kim, Jackson Lewis, P.C., Berkley Heights, New Jersey.
4. Christopher Emigholz, Chief Government Affairs Officer, New Jersey Business and Industry Association, Trenton, New Jersey.
5. Michael DeLoreto, Director, Gibbons, P.C., Trenton, New Jersey.
6. Louis Lessig, Esq., Brown & Connery, LLP, Westmont, New Jersey.
7. Jay Sabin, Partner, Brach Eichler, LLC, Roseland, New Jersey.
8. Diedra Viney, Owner, Express Employment Professionals, Edison, New Jersey.
9. Marianne Kemp, Owner, Express Employment Professionals, Hasbrouck Heights, New Jersey.
10. Robert F. Milman, Esq., Milman Labuda Law Group, PLLC, Lake Success, New York.
11. Kara Rogan, Chief Executive Officer, CoWorx Staffing Services, LLC (no address provided).
12. Manisha Subramanian, PrideStaff Edison (no address provided).
13. Two River Benefits Consultants, LLC, Tinton Falls, New Jersey.
14. Polly McDonald, President, TeleSearch Staffing Solutions (no address provided).
15. Mary Hagemann, Owner, Express Employment Professionals, Marlton, New Jersey.
16. Kenneth Beyer, President, Unique Wire Weaving Co., Inc., Hillside, New Jersey.
17. PrideStaff Inc., Fresno, California.

18. Jason Park, Director-Staffing, IN2U, Englewood Cliffs, New Jersey.

19. Elaine Damm, Chief Executive Officer, ACCU Staffing, Cherry Hill, New Jersey.

20. Steven Harz, Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, P.C., Springfield, New Jersey.

21. Thomas Kelly, President, Aerotek, Inc. (no address provided).

22. Kevin Mason, Express Employment Professionals, Somerville, New Jersey.

23. Marisa Trujillo, Government Relations Manager, State & Local, TrueBlue, Inc. (no address provided).

24. Katherine Phan, Policy and Research Associate, New Jersey Alliance for Immigrant Justice, Newark, New Jersey.

25. Arati Kreibich, Director of Democracy Organizing, New Jersey Working Families Party (no address provided).

26. The Center for Popular Democracy, Brooklyn, New York.

27. Sara Cullinane, Director, Make the Road New Jersey, Elizabeth, New Jersey.

28. Harbani Ahuja, Esq., Associate Counsel, Economic Justice, New Jersey Institute for Social Justice, Newark, New Jersey.

29. Yarrow Willman-Cole, Workplace Justice Program Director, New Jersey Citizen Action, (no address provided).

30. Senator Joe Cryan, New Jersey Senate, Legislative District 20.

N.J.A.C. 12:72-1.1 Scope

1. COMMENT: The commenter objects to proposed N.J.A.C. 12:72-1.1(c)2, which pertains to the scope of new Chapter 72. Specifically, proposed N.J.A.C. 12:72-1.1(b) states that the chapter is applicable to each temporary help service firm that is located, operates, or transacts business within New Jersey. Proposed N.J.A.C. 12:72-1.1(c)1, states that the chapter is applicable to each temporary laborer who is employed by a temporary help service firm referred to at subsection (b), who has been assigned by the temporary help service firm to work in a designated classification placement within New Jersey, and proposed N.J.A.C. 12:72-1.1(c)2, states that the chapter is applicable to each temporary laborer who is employed by a temporary help service firm referred to at subsection (b), who has been assigned by the temporary help service firm to work in a designated classification placement outside of New Jersey, but who has his or her primary residence in New Jersey. The commenter asserts the following:

> "The Department can certainly impose the Act on temporary help service firms and third-party clients operating in the State or injecting themselves into the stream of New Jersey commerce. But imposing the Act's requirements on temporary help service firms or third-party clients located in another state simply because a temporary laborer's primary residence is in New Jersey unconstitutionally interferes with interstate commerce."

2. COMMENT: The commenter suggests that proposed N.J.A.C. 12:72-1.1(c)2 be deleted from the proposed rules. The commenter maintains that if the Department of Labor and Workforce Development (Department) adopts N.J.A.C. 12:72-1.1(c)2, "there would be a significant reduction, if not elimination, of out-of-state employment opportunities for New Jersey temporary laborers in designated classification placements," adding, "[t]hese out-of-state worksites would no longer source New Jersey temporary laborers—an unfortunate consequence of this proposed regulation." In addition, the commenter asserts that, "imposition of New Jersey extraterritorial effect on worksites located outside of New Jersey (a) discriminates against New Jersey temporary help service firms who do business in other states and (b) creates issues on how the New Jersey law can be enforced against non-New Jersey worksites," adding that "[t]he New Jersey Department of Labor and Workforce Development would not have jurisdiction over out-of-state third party client worksites solely because they contract with either a New Jersey company or non-New Jersey company providing New Jersey residents as temporary laborers …"

RESPONSE TO COMMENTS 1 AND 2: N.J.S.A. 34:8D-8 states that "[a] temporary help service firm **which is located, operates, or transacts business within this State** shall not make any designated classification placements unless it is certified by the director [of the Division of Consumer Affairs] to do so …" (emphasis added). Thus, it is clear that the Legislature intended to empower the agencies responsible for enforcement of N.J.S.A. 34:8D-1 et seq., the Temporary Workers Bill of Rights (TWBR), of which N.J.S.A. 34:8D-8 is a part, to exercise jurisdiction not only over: (1) temporary help service firms that make designated classification placements and that have a physical location in New Jersey, but also over: (2) those temporary help service firms that make designated classification placements, have no physical New Jersey location, but operate or transact business in New Jersey. This is the basis for proposed N.J.A.C. 12:72-1.1(b), which mirrors the statute and states that "[t]his chapter is applicable to each temporary help service firm that is located, operates, or transacts business within New Jersey."

The next question which arises, and which is addressed at proposed N.J.A.C. 12:72-1.1(c), is which temporary laborers who work for covered temporary help service firms (that is, those temporary help service firms that are located, operate, or transact business within New Jersey and are, therefore, required pursuant to N.J.S.A. 34:8D-8 to be certified by the Director of the Division of Consumer Affairs to make designated classification placements), are entitled to the worker-specific protections afforded by the TWBR, like the notification requirements at N.J.S.A. 34:8D-3, the transportation-related requirements at N.J.S.A. 34:8D-5, the itemized statement requirements at N.J.S.A. 34:8D-6, and the post-employment restriction and equal pay and benefits requirements at N.J.S.A. 34:8D-7. The answer to that question, the Department believes, is every temporary laborer assigned to work in a designated classification placement who is employed by a covered temporary help service firm whom the State has a legitimate interest in protecting. See also N.J.S.A. 34:8D-2. In the Department's view, the State has a legitimate interest in protecting individuals: (1) who work in New Jersey; and (2) who live in New Jersey. Thus, proposed N.J.A.C. 12:72-1.1(c) defines the scope of the chapter's applicability to include each temporary laborer who is employed by a covered temporary help service firm who also: (1) has been assigned by the covered temporary help service firm to work in a designated classification placement within New Jersey; or (2) has been assigned by the covered temporary help service firm to work in a designated classification outside of New Jersey, but who has his or her primary residence in New Jersey.

As to the commenter's objection to the scenario where, pursuant to proposed N.J.A.C. 12:72-1.1(c), the requirements of the TWBR might be imposed "on temporary help service firms and third-party clients located in another state simply because a temporary laborer's primary residence is in New Jersey," the commenter should rest assured that coverage of a temporary help service firm pursuant to the TWBR will never be triggered, alone, by the primary residence in New Jersey of a temporary laborer assigned by the firm to work in a designated classification placement. Rather, the threshold requirement of temporary help service firm coverage must first be met; that is, it must first be established that the temporary help service firm that employs the New Jersey resident is located, operates, or transacts business in New Jersey. If the temporary help service firm is not located in, does not operate in, and does not transact business in New Jersey, then the temporary laborer who is assigned by that firm to work in a designated classification placement outside of New Jersey, but whose primary residence in New Jersey, will not be entitled to the worker protections of the TWBR.

3. COMMENT: The commenter asks whether professional employer organizations (PEOs), also known as employee leasing companies, are "regulated under [the TWBR]," adding, "[s]ome organizations in the State of New Jersey utilize [temporary help service firms] as PEOs for the purpose of covering payroll, benefits, workers' compensation, and training for their employees."

RESPONSE: Pursuant to New Jersey law and rules, a "temporary help service firm" and a "professional employer organization," are two separate and distinct entities. The term, "temporary help service firm," is defined at N.J.S.A. 34:8-43 and N.J.A.C. 13:45B-1.2 (in addition to N.J.S.A. 34:8D-2). Pursuant to N.J.A.C. 13:45B-12.2, all temporary help service firms are required to register annually with the Division of Consumer Affairs, within the Department of Law and Public Safety. The term "professional employer organization" or "employee leasing company" is defined at N.J.S.A. 34:8-67 and N.J.A.C. 12:16-24.2. Pursuant to N.J.A.C. 12:16-24.3, all PEOs are required to register annually with the Division of Employer Accounts within the Department

of Labor and Workforce Development. N.J.S.A. 34:8-75 expressly states that the provisions at N.J.S.A. 34:8-67 et seq., which govern PEOs, "shall not apply to temporary help service firms, as defined in N.J.S.A. 34:8-43." In other words, these two terms—"temporary help service firm" and "PEO"—are, by law, mutually exclusive.

As to whether, "PEOs are regulated as temporary help service firms under [the TWBR]," again, a temporary help service firm and a PEO are two separate and distinct things. A PEO is not a temporary help service firm and a temporary help service firm is not a PEO. Consequently, PEOs are not regulated pursuant to the TWBR as temporary help service firms.

N.J.A.C. 12:72-1.2 Retaliation Prohibited

4. COMMENT: The commenter states, regarding proposed N.J.A.C. 12:72-1.2(b), that "it should be made clearer that when an assignment ends within 90 days of an employee exercising their protected rights, temporary help service firms are able to rely on information available to them to rebut any presumption that the temporary help service firm retaliated against the temporary laborer."

5. COMMENT: The commenter states the following:

"Temporary employment, by its nature, is expected to be short-lived by all parties, including the temporary laborer who received duration information in the assignment notification form. Recognizing that the assignment may come to an end for reasons other than retaliation, we respectfully request the Department to include after 'terminates the temporary laborer's employment,' the following phrase "other than the scheduled end of the temporary laborer's assignment,' or alternatively include a provision that the temporary help service firm can use the length of assignment information in the temporary laborer's current assignment notice statement(s) in order to rebut the presumption."

RESPONSE TO COMMENTS 4 AND 5: Neither N.J.S.A. 34:8D-10, nor proposed N.J.A.C. 12:72-1.2(b), state that a rebuttable presumption of retaliation arises when "an assignment ends within 90 days of an employee exercising their protected rights." What both the law and proposed rule say is that a rebuttable presumption of retaliation arises when the temporary help service firm either terminates the temporary laborer's employment or takes any disciplinary action against the temporary laborer. Terminating the temporary laborer's employment means ending the temporary laborer's employment with the temporary help service firm, not ending the temporary laborer's assignment to a third-party client. As to the commenter's request that it be made clear at proposed N.J.A.C. 12:72-1.2(b) that a temporary help service firm has an opportunity to rebut the presumption of retaliation, that is already clear, since both the law and the proposed rule refer to the presumption of retaliation as a "rebuttable presumption."

As to the suggestion that the Department add the phrase, "other than the scheduled end of the temporary laborer's assignment," or include a provision that the temporary help service firm can use the length of assignment information in the assignment notification statement to rebut the presumption, those changes are neither necessary, nor appropriate. Again, pursuant to the law and proposed new rule, it is not the end of an assignment that triggers the rebuttable presumption of retaliation. Rather, it is the termination of employment or disciplinary action within 90 days of the temporary laborer's exercise of rights protected pursuant to the TWBR that triggers the rebuttable presumption of retaliation. Thus, if the temporary laborer's assignment ends within the 90-day period, but the temporary laborer remains employed by the temporary help service firm, no rebuttable presumption of retaliation arises (so long as no disciplinary action has been taken against the temporary laborer by the temporary help service firm).

N.J.A.C. 12:72-1.3 Administrative Penalties

6. COMMENT: The commenter maintains that "there are no liabilities [i.e., penalties] attached to the third-party clients," adding, "[u]nder the regulations, all liability is placed on the staffing agency." The commenter states that "both parties [the temporary help service firm and the third-party client] should be liable for providing accurate information and upholding the requirements of the regulations."

RESPONSE: Proposed N.J.A.C. 12:72-1.3 mirrors the penalty provisions found within the TWBR. That is, the Department has taken each of the penalty provisions from the pertinent sections of the TWBR (that is, the sections of the TWBR that the Department is responsible for enforcing) and has placed them in one section of the proposed new rules, at N.J.A.C. 12:72-1.3, Administrative penalties. The Department does not have any discretion to deviate from the penalty provisions of the TWBR; which is to say, the Department may not, as the commenter suggests, impose penalties against third-party clients through rulemaking, where no such penalties are authorized by law.

7. COMMENT: The commenter asks, "[i]n terms of penalties assessed 'per violation,' what is the definition of the term 'per violation?'" The commenter suggests that "per violation," should be defined "as meaning per person (so that all violations concerning one person will constitute one violation)."

RESPONSE: There is nothing in the TWBR to suggest that when it says a particular administrative penalty shall be assessed for "each violation," it means "all violations concerning one person." The Department is aware of no law that it enforces, including the Wage and Hour Law, N.J.S.A. 34:11-56a et seq., or the Wage Payment Law, N.J.S.A. 34:11-4.1 et seq., pursuant to which it is understood that administrative penalties for "each violation" means all violations concerning one person. Rather, it is the Department's understanding that when the TWBR, and the other laws that the Department enforces, require that a particular administrative penalty (for example, an amount not less than $500.00 and not to exceed $1,000) shall be assessed "for each violation," that it means what it says; that is, that the penalty shall be assessed "for each violation."

N.J.A.C. 12:72-2.1 Definitions

8. COMMENT: The commenter objects to the definition of the term "benefits," at proposed N.J.A.C. 12:72-2.1. The commenter maintains that it "goes far beyond what the Legislature intended." The term "benefits" is defined within the rulemaking to mean "employee fringe benefits, including but not limited to, health insurance, life insurance, disability insurance, paid time off (including vacation, holidays, personal leave and sick leave in excess of what is required by law), training, and pension." According to the commenter, the term "benefits" should be limited to employer-sponsored retirement and health benefits, because in the "preamble" to the Temporary Workers Bill of Rights (TWBR), N.J.S.A. 34:8D-1 et seq., it states that "full-time temporary help service firm workers earn 41 percent less than workers in traditional work arrangements, and these workers are far less likely than other workers to receive employer-sponsored retirement and health benefits." N.J.S.A. 34:8D-1. The commenter also objects to the Department's use within the proposed definition for the term "benefits," the phrase "including but not limited to." The commenter asserts that it "creates an open-ended list of potential benefits that are open to subjective application."

RESPONSE: The Department disagrees that the regulatory definition for the term "benefits" should be limited to employer-sponsored retirement and health benefits. The sentence at N.J.S.A. 34:8D-1 cited by the commenter, namely, that "full-time temporary help service firm workers earn 41 percent less than workers in traditional arrangements, and these workers are far less likely than other workers to receive employer-sponsored retirement and health benefits," is a statement regarding the inequities that exist in the workplace, generally, between workers who are employed by temporary help service firms and "other workers" who work in "traditional arrangements." It is a statement offered by the Legislature, among others, to explain why special protections are needed for temporary laborers. There is nothing to indicate that the Legislature intended for this general statement within the Findings and Declarations section of the TWBR to limit the law's application in the manner suggested by the commenter. In fact, if the Legislature had intended to limit the definition of "benefits" in the manner suggested by the commenter, it could have expressly defined the term "benefits" at N.J.S.A. 34:8D-2 to mean employer-sponsored retirement and health benefits; or, at N.J.S.A. 34:8D-7.b, it could have stated that any temporary laborer assigned to work at a third-party client in a designated classification placement shall not be paid less than the average rate of pay and average cost of employer-sponsored retirement and health benefits, or cash equivalent thereof, of employees of the third-party client performing the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions

for the third-party client at the time the temporary laborer is assigned to work at the third-party client. The Legislature did neither. Rather, at N.J.S.A. 34:8D-7.b, the Legislature refers simply to the average cost of benefits; and at N.J.S.A. 34:8D-2, the Legislature includes no definition for the term "benefits." In the absence of a definition for the term "benefits" within the TWBR, it is clearly within the discretion of the Commissioner of the Department of Labor and Workforce Development to define that term through rulemaking in the manner proposed. See N.J.S.A. 34:1-20 and 34:1A-3.e. Furthermore, as to the supposed "open-ended" nature of the Department's proposed definition for the term "benefits," it is worth noting that the Equal Employment Opportunity Commission (EEOC), in its rules for implementation of the Federal Equal Pay Act (EPA), which also requires a comparison of the wages and benefits of one worker to another, defines the term "fringe benefits" in the following manner:

> "Fringe benefits" includes, e.g., such terms as medical, hospital, accident, life insurance and retirement benefits; profit sharing and bonus plans; leave; and other such concepts.

This definition, like the Department's proposed definition for the term "benefits," contains a list of examples, and it also contains a catchall for "other such concepts." The latter is not unlike the Department's use of the phrase, "including but not limited to." Both approaches seek to illustrate what constitutes a "fringe benefit" or "benefit," while leaving open the possibility that there might be yet unknown types of benefits, which should be accounted for in the wage and benefits comparison.

9. COMMENT: The commenter states regarding the proposed definition of the term "benefits," that "some types of benefits, such as vacation time, are accrued over a specific interval, and some benefits, including health insurance, may have waiting periods prior to their effective date." Thus, the commenter suggests that the proposed rules should "specify that the comparison [between the wages and benefits of the temporary laborer and those of comparator employees working for the third-party client] is subject to any waiting or accrual periods implemented by the third-party client."

RESPONSE: N.J.S.A. 34:8D-7.b requires that, "[a]ny temporary laborer assigned to work at a third-party client in a designated classification placement shall not be paid less than the average rate of pay and average **cost of benefits**, or the cash equivalent thereof, of employees of the third-party client performing the same or similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions for the third-party client at the time the temporary laborer is assigned to work at the third-party client" (emphasis added). Thus, it is the cost of the benefits to the employer, not the value of the benefits to the employee, that is relevant for purposes of undertaking the comparison of the temporary laborer's pay and benefits to that of any comparator employees of the third-party client. Proposed N.J.A.C. 12:72-7.2 enumerates a step-by-step process for undertaking the wage/benefit comparison, which, after the third-party client's comparator employees are identified, essentially reduces the process to the following mathematical equation in which one simply solves for "X," with "X" being the hourly rate of pay that the temporary help service firm must pay the temporary laborer for the assignment:

> Hourly cost of benefits for the temporary laborer + X =
> (Sum of hourly rates of pay for third-party client's comparator employees ÷ Number of comparator employees) +
> (Sum of hourly cost of benefits for third-party client's comparator employees ÷ Number of comparator employees)

That is, on the temporary help service firm's side of the equation is: (1) the hourly cost of benefits for the temporary laborer (or, the annual cost to the temporary help service firm of the benefits that it provides to the temporary laborer in the year that the assignment is made divided by 2,080 hours); plus (2) "X." On the third-party client's side of the equation is: (1) the sum of the hourly rates of the comparator employees of the third-party client divided by the number of comparator employees (with the hourly rate of each salaried comparator employee arrived at by dividing the comparator employee's annual salary by 2,080 hours); plus (2) the sum of the cost per hour to the third-party client of benefits of the comparator employees divided by the number of comparator employees (with the cost per hour of benefits for each comparator employee arrived at by dividing the annual cost to the third-party client of benefits for that comparator employee by 2,080 hours).

With specific regard to the benefits component of that equation, proposed N.J.A.C. 12:72-7.2(d) states that "to calculate the cost per hour of benefits, **the annual cost** to the employer of benefits shall be divided by 2,080 hours" (emphasis added). Therefore, when determining what is the "cost per hour of benefits," one would divide by 2,080 the actual or anticipated annual cost to the employer of the benefits for the employee "at the time the temporary laborer is assigned to work at the third-party client" (N.J.S.A. 34:8D-7.b); that is, for the year in which the temporary laborer has been assigned to work at the third-party client. To determine the actual or anticipated cost to the employer of providing benefits to a given employee in a given year, the employer should arrive at a number in light of their accounting methods and business practices, and using the actual or best approximation of the actual or anticipated cost of providing an employee with benefits for the year. If the accrual period for vacation or the waiting period for health insurance extends beyond December 31 of that year and if this results in no cost to the employer for those benefits being incurred during that year, then the employer would not include any costs for those benefits in the comparison. However, if when the temporary laborer is assigned to work at the client company, the comparator employee of the third-party client has not yet accrued vacation, or is still in the waiting period for health insurance, but that accrual period or waiting period would elapse and costs would be incurred by the employer during that year, then those benefits costs would be included in the calculation.

10. COMMENT: The commenter states that "in an effort to encourage tenure, some companies pay more towards the cost of benefits the longer an employee is there," adding, "[i]n this situation, the tenure of the [third-party client's] employees could drastically skew the company's average cost of benefits."

RESPONSE: The "company's average cost of benefits" to all of its employees is not what is at issue. Pursuant to proposed N.J.A.C. 12:72-7.2, when calculating the hourly rate of pay that the temporary help service firm must pay the temporary laborer, what is at issue is the average cost of benefits for comparator employees of the third-party client. Thus, the first step, before one gets to the calculation of the hourly rate of pay that the temporary help service firm must pay the temporary laborer, is to identify the comparator employees of the third-party client, using the principles set forth at proposed N.J.A.C. 12:72-7.3. Once the comparator employees of the third-party client have been identified, then one simply follows the step-by-step instructions set forth at proposed N.J.A.C. 12:72-7.2, which indicate in pertinent part that to calculate the cost per hour of benefits for each comparator employee, the annual cost to the employer of benefits is divided by 2,080 hours. One then takes the sum of the cost per hour of benefits for all of the identified comparator employees and divides it by the number of comparator employees to arrive at the average cost per hour of benefits of the third-party client's comparator employees. The annual cost to the employer of each comparator employee's benefits is the basis for the calculation, regardless of whether the third-party client determines its level of contribution to the cost of benefits based on an employee's tenure. Presumably, the impact of a third-party client's tenure-based system for determining the level of employer contribution to the cost of benefits on the calculation of the rate of pay for temporary laborers assigned to work in designated classification placements with that third-party client, would equal out over time. That is, some calculations would skew higher, because a majority of the identified comparator employees have many years of service, and others would skew lower, because a majority of the identified comparator employees have fewer years of service. It is the Department's objective to promulgate rules of general application that are fair and may be applied uniformly. No change to address the commenter's concern will be made to the proposed definition of the term "benefits" at N.J.A.C. 12:72-2.1.

11. COMMENT: The commenter states that there are varying types of insurance coverage (for example, single, married, or family) and that the associated costs to the employer of each type of coverage also varies. The commenter maintains that, "[i]n some cases, this will drastically skew the average cost of benefits based on the level of insurance their [the third-party client's] employees are enrolled in."

12. COMMENT: The commenter states the following:

"To streamline the process for calculating the cost of benefits, the rules should allow third-party clients to establish a standard baseline amount, especially for the portion of benefits attributable to health care. For example, a standard health benefits amount could be based on employee-only coverage rates to avoid single temporary workers with no dependents getting the average benefits of third-party employees with benefits that cover their large families."

RESPONSE TO COMMENTS 11 AND 12: The TWBR and the proposed new rules, require that the third-party client side of the temporary laborer pay-rate equation be based on the average rate of pay and average cost of benefits of the third-party client's comparator employees. As with the tenure-based employer contribution system for the cost of employee benefits discussed in the Response to Comment 10, with the varying types and associated costs of health benefits (single, married, or family), one must use the actual annual cost to the employer of benefits for each comparator employee when calculating the minimum hourly rate of pay that the temporary help service firm must pay the temporary laborer, whatever that actual annual cost may be. As with the tenure-based employer contribution system discussed in the Response to Comment 10, presumably, the impact would equal out over time with each separate temporary laborer pay-rate calculation. That is, some calculations would skew higher, because a comparator employee(s) has costlier family health insurance coverage, and some calculations would skew lower, because a comparator employee(s) has less costly single employee health insurance coverage. N.J.S.A. 34:8D-7.b requires that any temporary laborer assigned to work at a third-party client in a designated classification placement shall not be paid less than the average rate of pay and average cost of benefits, or the cash equivalent thereof, of the third-party client's comparator employees. The only way to remain true to that statutory mandate is to use actual rates of pay and actual costs of benefits for the calculation, regardless of how those numbers may "skew."

13. COMMENT: The commenter states that "[e]very year the employer cost of benefits will vary based on the benefit plans they are offering, the cost of those plans, and the client employees that are enrolled during that year." The commenter asks, "[i]f the agency determines the average amount now, how often do they need to recalculate the average to ensure they are staying in compliance?"

RESPONSE: N.J.S.A. 34:8D-7 requires that "**[a]ny temporary laborer** assigned to work at a third-party client in a designated classification placement shall not be paid less than the average rate of pay and average cost of benefits, or the cash equivalent thereof, of employees of the third party client performing the same or substantially similar work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions for the third party client **at the time the temporary laborer is assigned** to work at the third-party client" (emphasis added). Thus, each time that any temporary laborer is assigned by a temporary help service firm to work at a third-party client, at the time of the assignment, the following must occur: (1) identification of comparator employees of the third-party client using the principles outlined at proposed N.J.A.C. 12:72-7.3; and (2) calculation, pursuant to proposed N.J.A.C. 12:72-7.2 of the hourly rate of pay that the temporary help service firm must pay the temporary laborer based on the average rate of pay and average cost of benefits of comparator employees of the third-party client. Whatever the relevant rates of pay and annual costs of benefits are at the time of assignment should be the basis for the temporary laborer hourly rate of pay calculation.

14. COMMENT: The commenter asks, "[w]ill the State provide a standard form to calculate the appropriate cost of pay and benefits?"

RESPONSE: Proposed N.J.A.C. 12:72-7.2 sets forth a step-by-step method for calculation of the hourly rate of pay that the temporary help service firm must pay the temporary laborer based on the average rate of pay and average cost of benefits of comparator employees of the third-party client. Once adopted, each temporary help service firm will be required to follow this step-by-step method. The Department will not be providing a "standard form."

15. COMMENT: The commenter states, "[i]t is often the case that temporary agency employees will work less hours than an (sic) full-time, third-party employee," and asks, "[i]s a staffing agency required to provide employees who work less than full-time hours with the same average pay and benefits that the third-party, full-time employee would receive?"

RESPONSE: The step-by-step method set forth at proposed N.J.A.C. 12:72-7.2 for calculation of the hourly rate of pay that the temporary help service firm must pay the temporary laborer calls for reduction of each of the calculation's variables to an hourly rate/cost; that is, the equation is: (1) average hourly rate of pay of third-party client's comparator employees; plus (2) average hourly rate of pay of third-party client's comparator employees; equals (3) cost per hour of benefits provided by the temporary help service firm to the temporary laborer; plus (4) "X," which is the required hourly rate of pay that the temporary help service firm must pay the temporary laborer. One then simply solves for "X." As each of the variables has been reduced to an hourly rate/cost, for the purpose of the calculation it does not matter whether the temporary laborer and the comparator employees of the third-party client are full-time or part-time employees. Once employees of the third-party client have been identified as comparator employees, applying the principles outlined at proposed N.J.A.C. 12:72-7.3, then one simply turns to the calculation set forth at proposed N.J.A.C. 12:72-7.2. Of course, if an employee of the third-party client is ruled out as a comparator employee based on a determination that the temporary laborer and the employee of the third-party client are not performing the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, then the rate of pay and cost of benefits for that employee of the third-party client will not be included in the N.J.A.C. 12:72-7.2 calculation.

16. COMMENT: The commenter suggests that "the Department state that 'benefits' are limited only to the employer's direct costs and does not include administrative and other indirect plan-related costs borne by the employer."

RESPONSE: Nothing at N.J.S.A. 34:8D-7.b indicates that "cost of benefits" should only include direct costs, and that it should not include "administrative and other indirect plan-related costs borne by the employer." Therefore, the Department declines to make the change suggested by the commenter.

17. COMMENT: The commenter suggests that "other than pensions, the Department clarify that 401(k) and other similar employee-voluntary retirement plans are not included in the definition of Benefits," adding, "[i]f any of these retirement plans are included, we respectfully request that only the average employer contribution to the plan over the eligible employee population is required."

RESPONSE: Neither of the changes suggested by the commenter are consistent with N.J.S.A. 34:8D-7.b. That is, N.J.S.A. 34:8D-7.b sets forth no exclusion of the cost to the employer of any particular type of employee benefit, including for employer contributions to "employee-voluntary retirement plans." Furthermore, N.J.S.A. 34:8D-7.b requires that the average cost of benefits among the third-party client's comparator employees be used for the calculation of a temporary laborer's rate of pay, not with regard to a particular benefit like a 401(k), the average cost of benefits among all of the third-party client's "eligible employee population." Consequently, the Department declines to make the commenter's requested changes.

18. COMMENT: The commenter takes issue with the definition at proposed N.J.A.C. 12:72-2.1 for the term "temporary help service firm." Specifically, the commenter suggests that the definition should be clarified to define "temporary," "excess," and "special" workloads.

RESPONSE: The definition for the term "temporary help service firm" at proposed N.J.A.C. 12:72-2.1 is taken verbatim from N.J.S.A. 34:8D-2; which, in turn, is identical to the definition for the term "temporary help service firm" at N.J.S.A. 34:8-43. No change to the definition at proposed N.J.A.C. 12:72-2.1 is necessary.

N.J.A.C. 12:72-3 Required Notices from Temporary Help Service Firm to Temporary Laborer

19. COMMENT: Regarding proposed N.J.A.C. 12:72-3.1(b), which requires the assignment notification statement required at proposed N.J.A.C. 12:72-3.1(a) to be provided by the temporary help service firm to the temporary laborer in English and in the language identified by the employee as the employee's primary language, the commenter states,

"[w]hat are we supposed to do if an applicant speaks a language we cannot understand? It is unreasonable to force staffing companies to have the ability to understand the 42 languages spoken in New Jersey."

20. COMMENT: Regarding proposed N.J.A.C. 12:72-3.1(b), the commenter states the following:

> "OSHA's policy requires 'an employer must instruct its employees using both a language and vocabulary that the employee can understand,' which theoretically would allow the individual's 'English as a second language" capability to meet OSHA's requirements. For OSHA, the individual's primary language comes into play only when the individual does not have adequate English literacy. However, these proposed regulations and the law do not allow for this 'English as a second language' option before requiring the primary language."

RESPONSE TO COMMENTS 19 AND 20: N.J.S.A. 34:8D-3.a expressly states that "[w]henever a temporary help service firm agrees to send a person to work as a temporary laborer in a designated classification placement, the temporary help service firm shall provide the temporary laborer, at the time of dispatch, a statement, in writing **in English and in the language identified by the employee as the employee's primary language**, containing the following items …" (emphasis added). The Department has no discretion to deviate from this statutory mandate.

21. COMMENT: The commenter maintains, regarding the assignment notification statement requirement at proposed N.J.A.C. 12:72-3 that "allowing an electronic transmission of the required information in a format other than the prescribed form by the NJDOL would be to the benefit of the temporary workers as well as less cumbersome for temporary staffing agencies."

22. COMMENT: The commenter states that, "[i]n view of the significant administrative burden this law is imposing on the staffing industry in terms of records retention for six years and the primary language requirement, we respectfully request the Department permit temporary help service firms in New Jersey produce their forms electronically," adding, "[i]n the law's Section 3.4, the law requires the form (which consists of data fields and supplemental information) to be approved by the Department but does not stipulate that the form cannot be produced by the temporary help service firm in a manner that allows it to efficiently administer and comply with the law's requirements."

RESPONSE TO COMMENTS 21 AND 22: N.J.S.A. 34:8D-3.a expressly requires that the assignment notification statement be provided by the temporary help service firm to the temporary laborer "on a form approved by the Commissioner." At proposed N.J.A.C. 12:72-3.1(c), the Department has given temporary help firms the greatest possible degree of latitude regarding the method for providing the form to the temporary laborer, allowing the form to be transmitted, whenever appropriate, by text, email, or other electronic exchange. However, the Department does not have the discretion to deviate from the statutory mandate that the assignment notification statement be delivered "on a form approved by the Commissioner." Thus, the Department has the option of either: (1) publishing a single form developed and approved by the Commissioner for use by all temporary help service firms; or (2) establishing a system for the submission by each temporary help service firm of its own form for review and approval by the Commissioner, and for the submission by each temporary help service firm of applications for approval of subsequent changes to the form. In the Department's view, the latter option is administratively untenable. Furthermore, as to the commenter's request that it be permitted to produce its own form electronically, because it would be "less cumbersome" or "more efficient" than using the form provided by the Department on its website, which has been pre-approved by the Commissioner, is a fillable PDF. Such a form can be completed on the computer or any other device(s), saved onto that device(s), and attached to any electronic transmission (that is, email or text). Consequently, the Department declines to make the change suggested by the commenter.

23. COMMENT: The commenter states, "[w]ith respect to the notification to temporary employees at the time of dispatch … there should be some notification consideration for the handling of a temporary employee who is placed by a temporary agency at more than one third-party client in a particular workday."

RESPONSE: Pursuant to N.J.S.A. 34:8D-3.a and proposed N.J.A.C. 12:72-3.1(a), a temporary help service firm is required at the time of dispatch to provide each temporary laborer assigned to work in a designated classification placement with an assignment notification statement for each such assignment. If a temporary help service firm is assigning a single temporary laborer to work on a given day for multiple third-party clients in separate designated classification placements, then the temporary help service firm must provide the temporary laborer with a separate assignment notification statement at the time of dispatch for each such separate designated classification placement.

24. COMMENT: The commenter observes, "Section 12:72-3.4(a) states that a temporary laborer who is employed by the temporary help service firm and is not placed on any day with a client or otherwise contracted for work, the temporary help service firm shall provide to the temporary laborer, upon the laborer's request, written confirmation that the laborer sought work on that day." The commenter claims not to understand what is meant by the phase "is employed," and suggests that the Department clarify the meaning of the phrase. The commenter suggests that the phrase "is employed," be defined to mean, "still on an active assignment for which the individual is currently receiving a weekly pay check and additional direction of the assignment is anticipated."

RESPONSE: The term "employ" is defined at N.J.S.A. 34:8D-2 (and proposed N.J.A.C. 12:72-2.1) to mean "to suffer or permit to work for compensation, including by means of ongoing, contractual relationships in which the employer retains substantial direct or indirect control over the employee's employment opportunities or terms and conditions of employment." The Department does not have the discretion to define the term "employ," as suggested by the commenter, in a manner that is inconsistent with the statutory definition of that term.

25. COMMENT: Regarding proposed N.J.A.C. 12:72-3.4(b), which states that the written confirmation of having sought work required pursuant to proposed N.J.A.C. 12:72-3.4(a) must be signed by an employee of the temporary help service firm, must indicate the date and time that the written confirmation was received by the temporary laborer, and must include the name of the temporary help service firm, and the name and address of the temporary laborer, the commenter suggests, "that the regulation be amended to allow, as is allowed in Section 12:72-3.1(c) [for the assignment notification statement], the written confirmation be provided in a manner appropriate to the request (1) in person in the office or (2) remotely by text, email or other electronic exchange."

RESPONSE: Proposed N.J.A.C. 12:72-3.4(b) is taken from N.J.S.A. 34:8D-3.a, including the requirement that the confirmation of having sought work be "signed by an employee of the temporary help service firm." As the commenter correctly observes, proposed N.J.A.C. 12:72-3.1(c) lists various methods that may be used by the temporary help service firm to provide the assignment notification statement to temporary laborers, "in a manner appropriate to whether the assignment is accepted at the temporary help service firm's office, or remotely by telephone, text, email or other electronic exchange." The reason for proposed N.J.A.C. 12:72-3.1(c) is that N.J.S.A. 34:8D-3.a expressly dictates that the assignment notification statement be provided to the temporary laborer "in a manner appropriate to whether the assignment is accepted at the temporary help service firm's office, or remotely by telephone, text, email or other electronic exchange." There is no such language at N.J.S.A. 34:8D-3.a that establishes the temporary help service firm's obligation to provide the temporary laborer with a confirmation of having sought work. Due to the absence of that language and the express requirement that the confirmation of having sought work be "signed by an employee of the temporary help service firm," the Department has concluded that the Legislature intended for the confirmation of having sought work to be a hard copy document, signed by a representative of the firm, and delivered directly to the temporary laborer. This is a document that will presumably be presented by the temporary laborer, likely to a government agency, as proof of having sought work. Thus, it is important that it be in a form that will effectively serve that purpose.

26. COMMENT: Regarding proposed N.J.A.C. 12:72-3.2, which requires that for a multi-day assignment, when there is a change in the schedule, shift, or location, the temporary help service firm shall, when possible, provide notice 48 hours in advance of the change to the temporary laborer in a manner appropriate to whether the assignment was

accepted at the temporary help service firm's office, or remotely by telephone, text, email, or other electronic exchange, the commenter suggests the following:

> "The regulations should be revised to include examples of when 48-hour notice would not be required by a temporary help service firm prior to the change in an employee's schedule, shift, or location. Additionally, the regulations should be revised to further clarify what would qualify as a change in 'schedule,' a change in 'shift,' and a change in 'location.'"

RESPONSE: Proposed N.J.A.C. 12:72-3.2(a) is taken verbatim from N.J.S.A. 34:8D-3.a. The Department does not believe that examples of when 48-hour notice would not be possible, or definitions for the terms, "schedule," "shift," or "location" are necessary. The meanings of the latter terms are generally understood. It is also generally understood that it is not possible to provide 48-hour notice of a change in schedule, shift, or location if the event that caused the need for the schedule, shift, or location change occurred less than 48 hours prior to the schedule, shift, or location change.

N.J.A.C. 12:72-4 Recordkeeping

27. COMMENT: The commenter objects to proposed N.J.A.C. 12:72-4.2(a), which requires that a third-party client keep the following records with regard to each temporary laborer assigned by a temporary help service firm to work in a designated classification placement for the third-party client: (1) the name, address, and telephone number of each worksite to which the temporary laborer was sent by the temporary help service firm, and the date that the temporary laborer was sent to each worksite; (2) the name and nature of the work that was performed by the temporary laborer; (3) the number of hours that were worked by the temporary laborer; and (4) the temporary laborer's hourly rate of pay. The commenter maintains that since, pursuant to N.J.S.A. 34:8D-4.a(2), the temporary help service firm is already required to keep these records, the requirement that the third-party client keep them is "an unnecessary administrative burden on the third-party client."

RESPONSE: N.J.S.A. 34:8D-4.a(2) requires both that the temporary help service firm keep the above-listed records and that, "[t]he third party client shall be required to remit all information required under this paragraph to the temporary help service firm no later than seven days following the last day of the work week worked by the temporary laborer." For the third-party client to have in its possession the information that it must remit to the temporary help service firm pursuant to N.J.S.A. 34:8D-4.a(2), it must first "keep" that information, for if it does not "keep" the information, then it will have nothing to remit to the temporary help service firm. It is only for the purpose of ensuring that the third-party client remit all of the information listed at N.J.S.A. 34:8D-4.a(2) to the temporary help service firm, as required, within seven days following the last day of the work week worked by the temporary laborer, that the Department is requiring the third-party to keep those records pursuant to proposed N.J.A.C. 12:72-4.2(a). In that regard, it is worth noting, the requirement that records be kept for a period of six years only appears at proposed N.J.A.C. 12:72-4.1(c), as it relates to the temporary help service firm's recordkeeping obligations. No such requirement appears at proposed N.J.A.C. 12:72-4.2 as it relates to the third-party client's limited recordkeeping obligations pursuant to the TWBR. Thus, the third-party client must keep the relevant information only until it remits the information listed at N.J.S.A. 34:8D-4.a(2) to the temporary help service firm. If the third-party client remits all of the information listed at N.J.S.A. 34:8D-4.a(2) to the temporary help service firm within seven days following the last day of the work week worked by the temporary laborer, as required, then the longest the third-party client would be required to keep the relevant records would be the seventh day following the last day of the work week worked by the temporary laborer.

N.J.A.C. 12:72-5 Transportation

28. COMMENT: Regarding proposed N.J.A.C. 12:72-5.3, which, in accordance with N.J.S.A. 34:8D-5.d, prohibits a temporary help service firm from referring a temporary laborer to any person for transportation to or from a worksite, unless the person is either: (1) a public mass transportation system; or (2) providing the transportation at no fee to the temporary laborer; which states that the following shall be considered a "referral" by a temporary help service firm: (1) directing a temporary laborer to accept a specific carpool as a condition of work; or (2) any mention or discussion of the cost of a carpool; and, which states that the following shall not be considered a referral by a temporary help service firm: informing a temporary laborer of the availability of a carpool driven by another temporary laborer; the commenter maintains the following:

> [T]his portion of the rule proposal presents a practical issue for temporary help service firms who are often asked by its employees related to transportation options. When asked a question by its employee related to transportation [the commenter, a temporary help service firm,] has not answered any of these questions since the adoption of the [TWBR] out of concern that it will be deemed to have 'referred' the temporary worker to [a] certain mode of transportation.

The commenter, therefore, suggests that the Department add an exception at N.J.A.C. 12:72-5.3 "to make it clear that a temporary help service firm may respond to an inquiry or question of a temporary laborer regarding transportation options so long as the temporary help service firm does not discuss cost or require a particular form of transportation as a condition of work."

RESPONSE: Proposed N.J.A.C. 12:72-5.3(b) and (c), which mirror N.J.S.A. 34:8D-5.d in pertinent part, state that a discussion between a temporary help service firm and a temporary laborer becomes a prohibited referral if the temporary help service firm either directs the temporary laborer to accept a specific carpool as a condition of work, or makes any mention during the discussion of the cost of a carpool, and that informing a temporary laborer of the availability of a carpool driven by another temporary laborer shall not be considered a prohibited referral. Proposed N.J.A.C. 12:72-5.3(a) also states that referring a temporary laborer to a person who is providing transportation at no fee to the temporary laborer is not a prohibited referral, nor is referring a temporary laborer to public mass transportation. Therefore, no exception suggested by the commenter is necessary, since it is already clear from the rule, as proposed, that a temporary help service firm is not prohibited from responding to an inquiry or question of a temporary laborer regarding transportation options when in responding, the temporary help service firm does not discuss cost or require a particular form of transportation as a condition of work.

29. COMMENT: The commenter claims that N.J.S.A. 34:11-4.4 "has long permitted staffing agencies to facilitate and deduct fees for private vanpool services to worksites lacking public transportation," and asks whether N.J.S.A. 34:8D-5 and proposed N.J.A.C. 12:72-5 would negate that. The commenter also claims that proposed N.J.A.C. 12:72-5 "is causing certain confusion as to whether this practice is still allowed or does the new legislation and rules guidance prohibit this existing practice by restricting van operators from charging a fee as they may arguably be considered a contractor of the staffing agency given the billing relationship and coordination of travel so temporary staff without access to transportation can get to and from work weekly."

RESPONSE: N.J.S.A. 34:11-4.4, which prohibits employers from withholding or diverting any portion of an employee's wages, except under certain limited circumstances, nowhere does it permit employers, including staffing agencies, to deduct from an employee's wages to pay for private vanpool services to worksites. N.J.S.A. 34:11-4.4 does, however, empower the Commissioner to authorize "such other contributions, deductions and payments" through regulation, "as [are] proper and in conformity with the intent and purpose of [the Wage Payment law]." On May 15, 2000, N.J.A.C. 12:55-1.2 and 2.2 were amended to permit an employer who provides transportation to a worksite to deduct from an employee's wages the actual cost, exclusive of profit to the employer, of such transportation, provided the deduction has been authorized by the employee in writing or in a collective bargaining agreement. Most recently, however, the TWBR was signed into law, including N.J.S.A. 34:8D-5, which expressly prohibits a temporary help service firm or a third-party client, or a contractor or agent of either, from charging any fee to a temporary laborer in a designated classification placement for transportation to or from a designated worksite. By law, a temporary laborer in a designated classification placement cannot be charged a fee for transportation to or from the designated worksite. Thus, a Departmental rule that would permit a payroll deduction from such an

employee's wages for the cost of such transportation would be inconsistent with the law's prohibition against charging a fee.

30. COMMENT: The commenter requests that proposed N.J.A.C. 12:72-5.5, which addresses transportation back to the point of hire in accordance with N.J.S.A. 34:8D-5.g, be changed so as to: (1) indicate that the requirement to provide transportation back to the point of hire only apply when transportation to the worksite was provided by "a transportation service provided or referred by the temporary help service firm or a third-party client, or a contractor or agent of either," and (2) replace "point of hire" with "point of hire or where the temporary laborer is picked up by the transportation service to go to the worksite prior to the start of the workday."

RESPONSE: Proposed N.J.A.C. 12:72-5.5(a) is taken verbatim from N.J.S.A. 34:8D-5.g. The Department can neither add the language suggested by the commenter, nor "replace" the phrase "point of hire" with what the commenter suggests, because to do so would be inconsistent with the statute. Thus, the Department declines to make the changes suggested by the commenter.

N.J.A.C. 12:72-6 Post Employment Restrictions/Placement Fee

31. COMMENT: The commenter asks whether the fact that a temporary laborer works fewer than eight hours per day will impact the maximum permissible placement fee calculation at proposed N.J.A.C. 12:72-6.2(b) and (c).

RESPONSE: The maximum permissible placement fee calculation is set forth step-by-step at N.J.A.C. 12:72-6.2(b) and (c). It is based on a comparison of the "commission" (fees, minus wages paid and cost of benefits; profit) the temporary help service firm would have received from a third-party client for the services of the temporary laborer over 43 work days, to the "commission" (fees, minus wages and cost of benefits; profit) the temporary help service firm actually did receive from third-party clients for the services of the temporary laborer during the 12-month period immediately preceding the date upon which the temporary laborer accepted an offer of employment by the third-party client. The concept outlined in the TWBR at N.J.S.A. 34:8D-7.a(1) and reflected at proposed N.J.A.C. 12:72-6.2 is that if on the date that a temporary laborer has accepted an offer of employment from a third-party client, the temporary help service firm had, during the preceding 12-month period, earned profit from the work of the temporary laborer that equals or exceeds the amount that the temporary help service firm would have profited from that temporary laborer's work over a 60-day period, then the temporary help service firm should not be permitted to charge the third-party client a placement fee; whereas, if the temporary help service firm has earned less in profit from the work of a temporary laborer during the preceding 12-month period than it would have earned in profit from the work of the temporary laborer over a 60-day period, then the temporary help service firm should be permitted to charge the third-party client a placement fee, but no more than the difference between the profit the firm would have earned from the work of the temporary laborer over a 60-day period and what the firm actually earned in profit from the work of the temporary laborer during the preceding 12-month period. What is relevant to the calculation is the "commission" (that is, profit) earned by the temporary help service firm, not the hours worked by the temporary laborer.

32. COMMENT: The commenter states the following:

> "The current calculation of placement fees provided in [proposed N.J.A.C.] 12:72-6.2 is based on days worked. Temporary employees are most commonly paid off the number of hours worked. We believe this should be adjusted and tracked using the hours worked, instead of days. If changed, most staffing firms would be able to maintain compliance with this requirement without having to adjust their software and timekeeping system."

RESPONSE: N.J.S.A. 34:8D-7.a(1) requires that a placement fee charged by a temporary help service firm to a third-party client must not exceed "the equivalent of the total daily commission rate the temporary help service firm would have received over a 60-day period, reduced by the equivalent of the daily commission rate the temporary help service firm would have received for each day the temporary laborer has performed work for the temporary help service firm in the preceding 12 months." By statute, the calculation is based on a "daily commission rate," not an hourly commission rate. Proposed N.J.A.C. 12:72-6.2(c), in the interest of assisting temporary help service firms sets forth a step-by-step procedure for calculating the maximum placement fee, which includes instructions as to how to determine "daily commission," as required through the TWBR; that is, by subtracting the daily wages paid by the temporary help service firm to the temporary laborer and the daily cost to the temporary help service firm of benefits provided to the temporary laborer from the amount paid by the third-party client to the temporary help service firm for the services of the temporary laborer. In other words, daily revenue minus daily cost equals daily profit to the temporary help service firm, or the firm's "daily commission rate."

33. COMMENT: The commenter asks the following:

> "The calculation of a conversion or placement fee formula outlined in N.J.A.C. 12:72-6.2(c)3 sets forth that the staffing agency looks at the number of days the temporary workers performed work for any third-party client of the staffing agency during the 12-month period immediately preceding the date upon which the temporary laborer accepted the offer of employment by the third-party client. As this provision only went into effect on August 5, 2023, does the staffing agency have to look back before August 5, 2023, to make this calculation or, at this point and until 12 months from August 5, 2023, have passed, does the staffing agency only look back to August 5, 2023?"

The commenter suggests that, "[a] reasonable read of the regulation is that when the TWBR went into effect on August 5, 2023, the staffing agency looks back a full 12-months, including time prior to August 5, 2023."

RESPONSE: The Department agrees with the commenter that the 12-month look back for the purpose of determining the maximum placement fee includes time prior to August 5, 2023.

34. COMMENT: The commenter suggests that proposed N.J.A.C. 12:72-6.2, "should be revised to include examples of the calculation of the maximum placement fee that may be charged by a temporary help service firm to a third-party client under various scenarios, including but not limited to, when a temporary laborer has been assigned to perform work for over 60 days and when a temporary laborer has been assigned to perform work for under 60 days."

RESPONSE: Purusant to N.J.S.A. 34:8D-7.a and proposed N.J.A.C. 12:72-6.2, the placement fee shall not exceed the equivalent of the total daily commission rate that the temporary help service firm would have received over a 60-day period, reduced by the equivalent of the daily commission rate that the temporary help service firm would have received for each day the temporary laborer would have performed work for the temporary help service firm in the preceding 12 months. Whether the temporary laborer performed work for over 60 days with the third-party client or under 60 days with the third-party client is not relevant to the calculation. Pursuant to proposed N.J.A.C. 12:72-6.2(c)2, in every instance, regardless of how long the temporary laborer performed work at the third-party client, the temporary help service firm will arrive at the "equivalent of the total daily commission rate that the temporary help service firm would have received over a 60-day period," by multiplying the "daily commission rate" by 43.

N.J.A.C. 12:72-7 Pay Equity

35. COMMENT: The commenter takes issue with proposed N.J.A.C. 12:72-7.3, which sets forth a list of principles that should be applied when determining whether a temporary laborer and an employee of the third-party client are performing substantially similar work. The commenter states that "[r]egulations …are not principles; they have the force and effect of law, and a department or agency must follow them." The commenter characterizes proposed N.J.A.C. 12:72-7.3 as "subjective" and "contradictory." Specifically, as to the commenter's allegation of subjectivity, he voices a very particular concern: that "the principles established in the Rule Proposal are subjective and this lack of standardization thereby authorizes or encourages the Department to engage in seriously discriminatory enforcement, including taking a stricter approach to compliance against entities which have provided comments in opposition to the [TWBR] and the Rule Proposal." As to consistency, the commenter provides examples of what he considers

instances of "direct contradiction" amongst the principles enumerated within proposed N.J.A.C. 12:72-7.3, including the following:

> (1) "Principle 7 [proposed N.J.A.C. 12:72-7.3(a)7] defines 'skill' to include factors such as 'experience, ability, education, and training required to perform a job,' yet Principle 10 [proposed N.J.A.C. 12:72-7.3(a)10] states that the seniority of a particular employee 'is not relevant to the determination of whether two jobs are substantially similar.' These two statements are in direct contradiction since experience, ability, education and training is specifically correlated to seniority."
> (2) "Principle 12 [proposed N.J.A.C. 12:72-7.3(a)12] defines working conditions as 'physical surroundings and hazards' but goes on to 'not include job shifts.' The shift a person works directly impacts their physical surroundings and hazards. Working at night, for instance, could be more dangerous than working in the day for some positions (i.e., lighting), and vice versa (i.e., heat)."

RESPONSE: Phrases like "same or substantially similar" are common in State and Federal employment and antidiscrimination law. For example, the Federal Equal Pay Act (Federal EPA) has, since 1963, prohibited discrimination "between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex…**for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions**" (emphasis added). 29 U.S.C. § 206(d); see *New Jersey Staffing All.* v. *Fais*, 110 F.4th 201, No. 23-2419, 2024 WL 3515883, at *4 (3d Cir. July 24, 2024) (noting that "the language of the [TWBR] resembles that of the Federal Equal Pay Act"). The Equal Employment Opportunity Commission (EEOC) regulations implementing the Federal EPA, make clear that: 1. "The equal work standard does not require that compared jobs be identical, only that they be substantially equal." 29 CFR 1620.13; and 2. the term "wages" includes "all payments made to or on behalf of an employee as remuneration for employment" and that "fringe benefits are deemed to be remuneration for employment." 29 CFR 1620.10. Similarly, New Jersey's Diane B. Allen Equal Pay Act (State EPA) prohibits an employer from "pay[ing] any of its employees who is a member of a protected class **at a rate of compensation, including benefits**, which is less than the rate paid by the employer to employees who are not members of the protected class **for substantially similar work, when viewed as a composite of skill, effort and responsibility**" (emphasis added) N.J.S.A. 10:5-12.t. Other state laws have also long relied on the "same or substantially similar" language. See, Cal. Labor Code Sec. 1197.5(a); Colo. Rv. State. Ann. Sec. 8-5-102; Haw. Rev. Stat. Ann. Sec. 378-2.3(a); 820 Ill. Comp. Stat. Ann. Sec. 105/4; La. Rev. State. Ann Sec. 23.664(a); N.Y. Labor Law Sec. 194; Wis. Stat. Ann. Sec. 111.36. As the standard at N.J.S.A. 34:8D-7 for comparing the work performed on jobs by a temporary laborer to the work performed on jobs by an employee of a third-party client—"same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions for the third party client at the time the temporary laborer is assigned to work at the third party client"—is similar to the Federal Environmental Protection Agency (EPA) standard, the state EPA standard, and the various other State analogues, the Department was able to consult relevant Federal and State regulations and guidance on application of the "same or substantially similar work" standard when assembling the guiding principles which appear at proposed N.J.A.C. 12:72-7.3.

As to the Department's characterization at N.J.A.C. 12:72-7.3(a)1 through 12, as "principles [which] should be applied when determining whether a temporary laborer and an employee of the third-party client are performing substantially similar work," the commenter's focus on, and attribution of, significance to the Department's use of the word "principles," is unjustified. When one is determining, pursuant to the TWBR, whether a temporary laborer and third-party client employee are performing substantially similar work, he or she should be guided by, and ultimately must adhere to, N.J.A.C. 12:72-7.3(a)1 through 12, which reflect the Department's interpretation of the meaning of the phrase "substantially similar work." This is no different than the EEOC rules at 29 CFR Part 1620, governing application of the Federal EPA's "substantially similar work" standard.

For example, when, at proposed N.J.A.C. 12:72-7.3(a)2, the Department states that "[f]unctions and duties need not be identical in order to be substantially similar," and at proposed N.J.A.C. 12:72-7.3(a)3, states that "occasional, trivial or minor differences in duties that only consume a minimal amount of the employee's time will not render the work dissimilar," it is no different than when the EEOC announces, at 29 CFR 1620.14(a), that "[i]nsubstantial or minor differences in the degree or amount of skill, or effort, or responsibility required for the performance of jobs will not render the equal pay standard inapplicable." Similarly, when, at proposed N.J.A.C. 12:72-7.3(a)7, the Department states that "[s]kill is measured by factors such as the experience, ability, education and training required to perform a job," it is no different than when the EEOC announces, at 29 CFR 1620.15(a), that "[s]kill includes consideration of such factors as experience, training, education, and ability." When the EEOC states, at 29 CFR 1620.15, that "[i]f an employee must have essentially the same skill in order to perform either of two jobs, the jobs will qualify under the EPA as jobs the performance of which requires equal skill, even though the employee in one of the jobs may not exercise the required skill as frequently or during as much of his or her working time as the employee in the other job," it is not unlike when the Department announces at N.J.A.C. 12:72-7.3(a) that "the determination should focus on an analysis of the actual job duties performed, not the specific person performing the work." Also, when the Department announces, at proposed N.J.A.C. 12:72-7.3(a)12, that "[w]orking conditions, for the purpose of determining whether two jobs are being performed under similar working conditions, means the physical surroundings and hazards …" it is no different than when the EEOC states that "[t]he term 'similar working conditions' encompasses two subfactors: 'surroundings' and 'hazards.'"

The commenter asserts that the principles announced at proposed N.J.A.C. 12:72-7.3(a) for the purpose of determining whether a temporary laborer and an employee of the third-party client are performing substantially similar work are "subjective and … [will] authorize or encourage the Department to engage in seriously discriminatory enforcement, including taking a stricter approach to compliance against entities which have provided comments in opposition to the Act and the Rule Proposal." The Department responds that: 1. proposed N.J.A.C. 12:72-7.3(a)1 through 12, align with the regulations of the EEOC at 29 CFR Part 1620, which interpret the Federal EPA's equal pay requirement; and 2. the Department strongly rejects the notion that it would target particular entities for their legitimate participation in the legislative and rulemaking process. Furthermore, there are many safeguards in place against arbitrary enforcement action including access to appeal a final determination of the Department.

As to the commenter's assertion that proposed N.J.A.C. 12:72-7.3(a)7 and 10, are "contradictory," this simply is not so. It must be understood, when reading paragraphs (a)7 and 10, that pursuant to N.J.S.A. 34:8D-7, what is being evaluated are the characteristics and requirements of the job being performed, not the characteristics of the person performing the job; that is, the Department is determining whether the experience, ability, education, and training required to perform two jobs are substantially similar, not whether the experience, ability, education, and training of two people are substantially similar. Consequently, it is not at all contradictory or inconsistent to say that: 1. skill will be measured by factors such as the experience, ability, education, and training required to perform a job; and 2. the number of years of service of a particular employee will not be relevant to the determination of whether two jobs are substantially similar. This is illustrated in the example that already appears within the proposed rule at N.J.A.C. 12:72-7.3(a)10i, where it explains that if the job to which a temporary laborer is being assigned with the third-party client requires five years of relevant experience and the job being performed by the prospective comparator employee of the third-party client requires five years of the same experience, this would be a factor mitigating in favor of a finding that the two jobs are substantially similar, notwithstanding that the comparator employee of the third-party client has worked for the third-party client for more than five years.

The commenter's assertion that N.J.A.C. 12:72-7.3(a)12, is internally inconsistent or "contradictory" is untrue. That is, the commenter

maintains that it is inconsistent to state, as it does at proposed N.J.A.C. 12:72-7.3(a)12, that working conditions means the physical surroundings and hazards at the worksite, but that job shifts are not included. According to the commenter, the shift a person works directly impacts their physical surroundings, adding that working at night, for example, "could be more dangerous than working in the day for some positions (i.e., lighting), and vice versa (i.e., heat)." However, the exclusion of job shifts from the "working conditions" analysis does not mean that the differing hazards that may be present at a worksite during different shifts may not be taken into consideration. What it means is that the employer may not use the fact that the work of a temporary laborer being assigned to work for a third-party client and the work of a potential comparator employee of the third-party client will be performed on different shifts, in and of itself, as the basis to conclude that the working conditions of the two positions are dissimilar and that, therefore, the temporary laborer and the potential comparator employee of the third-party client are not performing the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. Rather, proposed N.J.A.C. 12:72-7.3(a)12, requires that for each job—that of: 1. the temporary laborer assigned to work for the third-party client; and 2. the potential comparator employee of the third-party client—the question of whether the working conditions are similar should be based on an analysis of the physical surroundings and hazards. Consequently, the temporary help service firm and third-party client will be prohibited from excluding a particular employee from the pool of comparator employees of the third-party client solely on the basis that the potential comparator employee works the third shift, whereas the temporary laborer is going to work the second shift. However, the same temporary help service firm or third-party client would be permitted to consider differences in those characteristics of the job that relate to physical surroundings or hazards, including if those differences stem from the different shifts being worked.

36. COMMENT: The commenter asks, "[w]hat is the geographical scope of a third-party client's business that must be used when determining whether there are comparator employees for the pay equity calculation (e.g., does the client conduct an analysis by department, building/facility, statewide, companywide, etc.)?"

RESPONSE: There is nothing within the TWBR; specifically, at N.J.S.A. 34:8D-7.b, to suggest that the identification of comparator employees of the third-party client should be limited to a geographical scope, or that it should be limited to a department or facility of the third-party client, or to facilities of the third-party client within the State where the temporary laborer is being assigned to work in a designated classification placement. Rather, N.J.S.A. 34:8D-7.b indicates simply that the pay equity calculation should be based on the average rate of pay and average cost of benefits, or the cash equivalent thereof, "of employees of the third-party client performing the same or substantially similar work …" Thus, when identifying comparator employees pursuant to N.J.S.A. 34:8D-7.b and proposed N.J.A.C. 12:72-7.3 for the purpose of calculating the minimum hourly rate of pay that the temporary help service firm must pay the temporary laborer, the third-party client should evaluate all of its employees.

37. COMMENT: The commenter asks, "[i]s there a process to apply for an exemption from the requirements of the TWBR for designated classification placements which fall within one of the Bureau of Labor Statistics occupational categories subject to the TWBR but which do not appear to have been intended to be covered (e.g., airplane pilots, flight attendants or crew)?" The commenter adds that, "an application process should be developed that allows for exemptions from the TWBR where it can be established that the occupational category at issue is not in need of the protections afforded by the TWBR."

RESPONSE: The TWBR contains no such exemption and the Department does not have the authority to create through agency rulemaking either the exemption or the application process suggested by the commenter.

38. COMMENT: The commenter asks, "[w]ith regard to the pay equity calculation and the analysis of whether comparator employees exist, is there a percentage that can be used as a rule-of-thumb to determine whether a position which overlaps in some duties with a comparator position should also be considered a comparator position as well (e.g., production line employees are comparators to temporary worker. Supervisors perform production line work 10 to 30 percent of their time, as necessary, to meet production deadlines. At what point should the supervisors be considered a production line comparator employee?)". The commenter suggests that, "[w]hen the duties of a separate position overlap 30 percent or more on a regular basis with that of a comparator position, then the otherwise separate position should be considered a comparator position as well."

RESPONSE: Nothing at N.J.S.A. 34:8D-7.b or proposed N.J.A.C. 12:72-7.3 suggests any "rule-of-thumb" based on any particular percentage overlap of duties to determine whether an employee of the third-party client is a comparator employee. Rather, third-party clients should conduct an employee-by-employee analysis using the principles set forth at proposed N.J.A.C. 12:72-7.3.

39. COMMENT: The commenter suggests that, "[b]ecause of the complexities and inherent subjectivity of comparing two jobs [at N.J.S.A. 34:8D-7 and proposed N.J.A.C. 12:72-7] … that the final rule provide a safe harbor for good faith efforts to compare the work performed by two laborers even if a different comparison would have resulted in a different assessment as to whether the jobs are substantially similar."

RESPONSE: Proposed N.J.A.C. 12:72-1.3(i) requires that in addressing an administrative penalty for violations of the TWBR or proposed N.J.A.C. 12:72, the Commissioner "**shall** consider the following factors, where applicable, in determining what constitutes an appropriate penalty for the particular violation(s): (1) The seriousness of the violation(s); (2) The past history of violations by the temporary help service firm or third-party client, as appropriate; (3) The **good faith** of the temporary help service firm or third-party client, as appropriate; (4) The size of the temporary help service firm's or third-party client's business, as appropriate; and (5) Any other factors that the Commissioner deems appropriate in determining the penalty assessed" (emphasis added). Thus, the good faith of a temporary help service firm or third-party client indeed must be taken into consideration by the Department when determining the appropriateness of a penalty or penalties for a violation(s) of the TWBR or proposed N.J.A.C. 12:72.

40. COMMENT: The commenter asks, "[i]n assessing whether a direct employee is a comparator, are part time positions distinguishable from full time positions?" The commenter suggests that they should be, adding, "the fact that a position is part time versus full time is a distinguishing factor that may be used to determine that a direct employee position is not comparable to a temporary worker's position."

RESPONSE: Pursuant to N.J.S.A. 34:8D-7.b and proposed N.J.A.C. 12:72-2.1 and 7.1, a comparator employee is an employee of the third-party client to which the temporary laborer is assigned, who is performing the same or substantially similar work to that of the temporary laborer at the time the temporary laborer is assigned to the third-party client, on a job the performance of which requires equal skill, effort, and responsibility to that of the temporary laborer, and which is performed under similar working conditions. Pursuant to proposed N.J.A.C. 12:72-7.3(a)12, working conditions, for the purpose of determining whether two jobs are being performed under similar working conditions, means the physical surroundings and hazards, but does not include job shifts. Thus, if the full-time position and the part-time position require equal skill, effort, and responsibility and are performed in the same physical surroundings, subject to the same hazards, then they are substantially similar.

41. COMMENT: The commenter suggests that the following be added at N.J.A.C. 12:72-7.3(a)13, to the list of principles that should be applied when determining whether a temporary laborer and an employee of the third-party client are performing substantially similar work: "The difference in benefits and wages paid to full-time employees compared to those paid to part-time employees."

RESPONSE: The suggested change would be inappropriate as the required comparison relates to the nature of the work ("same or substantially similar work on jobs the performance of which requires equal skill, effort and responsibility") and the working conditions ("under similar working conditions"). The objective is to ensure that the temporary laborer assigned to work at a third-party client in a designated classification placement is paid no less than the average rate of pay and average cost of benefits, or the cash equivalent thereof, of comparator

employees of the third-party client. If the level of wages and cost of benefits, themselves, were permitted to be the basis for differentiating one job from another, that would negate the statutorily required nature of the work and working conditions analysis.

42. COMMENT: The commenter asks whether a temporary help service firm may rely on the information it receives from a third-party client for the purpose of calculating the hourly rate of pay that it must pay a temporary laborer based on the average rate of pay and average cost of benefits of comparator employees of the third-party client and asks whether the temporary help service firm has "any liability in regard to the information provided by the third-party client."

RESPONSE: Proposed N.J.A.C. 12:72-7.2(a) states that "[a]t the time that the temporary help service firm contracts with the third-party client for the services of the temporary laborer, the third-party client shall provide to the temporary help service firm a listing of the hourly rate of pay and cost per hour of benefits for each employee of the third-party client who the third-party client determines would be a comparator employee." Proposed N.J.A.C. 12:72-7.2(b) states that, "[t]he temporary help service firm shall base its calculation of the average rate of pay and average cost of benefits for comparator employees of the third-party client, for the purpose of determining the temporary laborer's hourly rate of pay, on the information that it receives from the third-party client under N.J.A.C. 12:72-7.2(a)." Finally, N.J.S.A. 34:8D-7.d states that "[i]f a third-party client leases or contracts with a temporary help service firm for the services of a temporary laborer in a designated classification [placement], the third-party client shall be, with the temporary help service firm, jointly and severally responsible for any violation of [N.J.S.A. 34:8D-7], including with respect to relief provided by [N.J.S.A. 34:8D-11] and civil penalties found by the Commissioner." Thus, the third-party client is responsible for providing the temporary help service firm with accurate information regarding the identification of comparator employees and their hourly rates of pay and the cost per hour to the employer for their benefits, the temporary help service firm is responsible for calculating the hourly rate of pay that it must pay the temporary laborer based on the information it receives from the third-party client, and if the temporary laborer is ultimately not paid the hourly rate to which he or she is entitled to pursuant to N.J.S.A. 34:8D-7 and N.J.A.C. 12:72-7, then both the temporary help service firm and the third-party client are jointly and severally liable for the entire amount assessed by the Department resulting from the temporary help service firm's failure to pay the required hourly wage.

43. COMMENT: The commenter suggests that "since the [third-party client] is in total control of the list of comparator employees, it should be the [third-party client's] responsibility to calculate the results of the average hourly pay rate(s) and average hourly cost(s) of benefits … and provide these data points to the temporary help service firm at the time of contracting."

RESPONSE: Proposed N.J.A.C. 12:72-7.2 already requires that "[a]t the time the temporary help service firm contracts with the third-party client for the services of the temporary laborer, the third-party client shall provide to the temporary help service firm a listing of the hourly rate of pay and cost per hour of benefits for each employee of the third-party client who the third-party client determines would be a comparator employee." This is all of the data that the temporary help service firm requires from the third-party client in order for the temporary help service firm to perform the calculation of the rate of pay for the temporary laborer using the method set forth at proposed N.J.A.C. 12:72-7.2; which is to say, with the required data in hand (a listing of the hourly rate of pay and cost per hour of benefits for each employee of the third-party client who the third-party client determines would be a comparator employee), all that the temporary help service firm must do on the third-party client side of the equation is calculate the average.

44. COMMENT: At proposed N.J.A.C. 12:72-7.2(e)4, the commenter suggests adding the word "minimum" to the phrase, "[t]he amount in 3. above is the hourly rate of pay that the temporary help service firm shall pay the temporary laborer for all work performed on the designated classification placement." The commenter explains, "there may be occasions when the temporary help service firm will, for its own business reasons, pay a temporary laborer more than the calculated rate."

RESPONSE: N.J.S.A. 34:8D-7.b and proposed N.J.A.C. 12:72-7.1 do, in fact, indicate that a temporary laborer in a designated classification placement shall "**not** be paid **less than** the average rate of pay and average cost of benefits, or the cash equivalent thereof" (emphasis added), of comparator employees of the third-party client, and proposed N.J.A.C. 12:72-7.2 does, throughout, indicate that it sets forth the method for calculating the hourly rate that the temporary help service firm "must pay" the temporary laborer. Consequently, the Department will make the suggested change on adoption, adding the word "minimum" to the phrase "hourly rate of pay," where appropriate.

45. COMMENT: The commenter suggests that the Department should, "create an exemption within the Rule Proposal [from the inclusion of benefits in the comparison between the wages and benefits of temporary laborers and comparator employees of third-party clients] for temporary help service firms that provide benefits to their employees." The commenter maintains that the formula for calculation of the rate of pay the temporary help service firm must pay the temporary laborer based on the average rate of pay and average cost of benefits of comparator employees of the third-party client, "creates the undesirable result whereby an employee who accepts benefits from the temporary help service firm will also receive a cash payment on top of the cost of benefits, since the rule proposal makes no distinctions between employees who accept or reject benefits."

46. COMMENT: The commenter asks, "[i]f a [temporary help service firm] offers the same or more generous benefits to its temporary [laborers] than the third-party client offers to its employees, can the parties disregard the "average cost of benefits, or the cash equivalent thereof" step of the pay equity calculation under [proposed N.J.A.C. 12:72-7.2]?"

RESPONSE TO COMMENTS 45 AND 46: The TWBR contains no exemption for temporary help service firms that provide benefits to their employees, nor does the TWBR permit a temporary help service firm to disregard the "average cost of benefits, or the cash equivalent thereof" step of the pay equity calculation when the temporary help service firm offers "the same or more generous benefits to its temporary laborers than the third-party client offers to its employees." The Department has no discretion to create the exemption suggested by the commenter through rulemaking, nor does the Department have the discretion through rulemaking to allow temporary help service firms to "disregard" any part of the pay equity calculation.

It is also not accurate to state that the proposed new rules fail to account for employees who reject benefits, as opposed to those who accept them. As indicated in the responses to prior comments, it is the cost to the employer of the benefit that is relevant to the calculation (not the value to the employee). If a particular employee, for example, rejects the employer's offer of health insurance then there would be no cost to the employer to provide health insurance to that employee and, therefore, no dollar figure for the benefit of health insurance to include in the calculation. The method for calculating the rate that the temporary help service firm must pay the temporary laborer is set forth at proposed N.J.A.C. 12:72-7.2 and it provides simple, step-by-step instructions (described in detail above).

47. COMMENT: The commenter asks, regarding proposed N.J.A.C. 12:72-7.2(d) and (e), "[d]oes the 2080 hours only (sic) regular hours or does OT hours count toward calculation," adding, "[i]f it is all hours types, are the benefits prorated based on an OT factor?"

RESPONSE: Proposed N.J.A.C. 12:72-7.2 sets forth a step-by-step process to follow when calculating the rate that the temporary help service firm must pay the temporary laborer based on the average rate of pay and average cost of benefits of comparator employees of the third party. The purpose of enumerating this step-by-step process is to simplify the calculation method and minimize any burden on temporary help service firms. At proposed N.J.A.C. 12:72-7.2(d), it is explained that "[t]o calculate the cost per hour of benefits, the annual cost to the employer of benefits shall be divided by 2,080 hours." This is a firm rule intended to simplify the process. What the Department is communicating to the regulated community is that one should not take into consideration the actual hours worked by the comparator employee when calculating the cost per hour of benefits. Instead, in every instance, one should simply divide the annual cost of benefits by 2,080 in order to arrive at the cost per hour of benefits for a given comparator employee of the third-party client.

48. COMMENT: The commenter asks, "in regard to a 401(k), if a [third-party client] provides a match, are [temporary help service firms] required to also?"

RESPONSE: N.J.S.A. 34:8D-7.b and proposed N.J.A.C. 12:72-7 require the temporary help service firm to pay the temporary laborer no less than the average rate of pay and average cost of benefits, or the cash equivalent thereof, of comparator employees of the third-party client. Neither the law, nor the proposed rules, require that the temporary help service firm provide each temporary laborer identical benefits to those the third-party client provides to its employees. In other words, using the commenter's example, the law and proposed rules do not require that the temporary help service firm provide the same 401(k) match that the third-party client provides, nor do the law or rules require that the temporary help service firm provide the temporary laborer with a 401(k) plan at all. What the law and proposed rules require is that: 1. the rate of pay and cost of benefits on the temporary laborer side of the pay equity equation equal; and 2. the average rate of pay and average cost of benefits on the third-party comparator employees side of the pay equity equation. To be clear, it is not that the temporary help service firm must provide a temporary laborer the same benefits that are provided by the third-party client to its comparator employees, it is that in determining the rate of pay to the temporary laborer, the temporary help service firm must account for the cost to the third-party client of providing the benefits to its comparator employees; and when the cost of benefits provided to the temporary laborer by the temporary help service firm is less than the average cost of benefits provided to the comparator employees by the third-party client, the difference may be made up by the temporary help service firm through increasing the rate of pay of the temporary laborer.

49. COMMENT: Regarding proposed N.J.A.C. 12:72-7.2(e), the commenter asks, "[h]ow do roles with probationary training periods get calculated, do you blend the total earned over a full year or just the average starting wage, and then recalculate post the probationary period close date?" The commenter adds, "Example—Client pays $15.00 per hour during the first 90-day training period and then pay increase to $16.00 per hour upon completion of the training."

50. COMMENT: The commenter asks, "[i]f a [temporary help service firm] is notified after the fact that their [third-party client] has increased rates [of pay] or provided bonuses, are they required to retroactively provide the same rates/bonuses to [the temporary help service firm's] employees?"

51. COMMENT: The commenter asks, "[f]or entry level roles with no experience required, should [temporary help service firms] pay the same entry level rate as the [third-party client] would pay and then provide increases similarly to the increases the client would pay based on time in role and skills gained?"

52. COMMENT: The commenter asks, "[h]ow do [temporary help service firms] handle step levels within the same job classification?" The commenter adds, "Example—0-6 months in learning period with a lower productivity…at 6 months you are producing more and receive a productivity increase."

RESPONSE TO COMMENTS 49, 50, 51, AND 52: N.J.S.A. 34:8D-7.b and proposed N.J.A.C. 12:72-7.2(a) state that what is relevant to the pay equity calculation is the average rate of pay and average cost of benefits of comparator employees of the third-party client "at the time the temporary laborer is assigned to work at the third-party client." When calculating the average rate of pay of comparator employees of the third-party client based on the individual hourly rates of pay of those comparator employees, if a given comparator employee of the third-party client is paid an hourly rate of pay, as in the example provided by the commenter, then one would simply use the hourly rate being paid to that comparator employee "at the time the temporary laborer is assigned to work at the third-party client." Using the commenter's example, if at the time the temporary laborer is assigned to work at the third-party client, the comparator employee is in their probationary period, then that individual's rate of pay would be $15.00 per hour. If at the time the temporary laborer is assigned to work at the third-party client, the comparator employee has completed their probationary period, then that individual's rate of pay would be $16.00 per hour. Proposed N.J.A.C. 12:72-7.2(c) also explains that where the third-party client pays a comparator employee on a salary basis, the hourly rate of pay for the comparator employee shall be calculated by dividing the annual salary paid to the comparator employee by 2,080 hours. Thus, if the comparator employee in the commenter's example was paid on an annual salary basis; if the probationary annual salary is $35,000, after which the comparator employee's annual salary is increased to $40,000; and if the comparator employee was "at the time the temporary laborer is assigned to work at the third-party client," still a week away from competing their probationary period, then pursuant to proposed N.J.A.C. 12:72-7.2(c), one would compute the comparator employee's hourly rate of pay by dividing $35,000 by 2,080, yielding an hourly rate of pay of $16.83.

53. COMMENT: The commenter asks, "[f]or clients who use tenured based step pay increases, does a [temporary help service firm] truly have to pay the average, even though the third-party client will pay new hires less?" The commenter adds, "[i]f they were to take an average of their employees' pay rates to determine the pay rate for temp associates, a [temporary help service firm] would be paying temporary associates more on day 1 than their new employees would earn."

RESPONSE: N.J.S.A. 34:8D-7.b is clear that a temporary laborer assigned to work at a third-party client in a designated classification placement shall not be paid less than the average rate of pay and average cost of benefits, or the cash equivalent thereof, of comparator employees of the third-party client. Applying N.J.S.A. 34:8D-7.b, unless there is only one comparator employee of the third-party client or unless the rate of pay and cost of benefits for every comparator employee is identical, the temporary laborer will earn a higher rate of pay than at least one of the third-party client's comparator employees. This is what N.J.S.A. 34:8D-7.b requires. The Department has no discretion to deviate from this statutory mandate.

54. COMMENT: The commenter asks, "[a]re third-party client unionized workforces exempt from the pay equity calculations?" The commenter suggests that such an exemption should exist, because "[t]o allow temporary workers to receive a higher rate of pay than unionized direct comparator employees because of a pay equity calculation would undermine the purpose and value of having a union represent the interests of the direct employees. It would also detrimentally impact the work environment of those direct employees."

RESPONSE: There is no exemption at N.J.S.A. 34:8D-7.b, when determining the rate of pay that the temporary help service firm must pay the temporary laborer based on the average rate of pay and average cost of benefits of comparator employees of the third-party client, for instances when the third-party client has a unionized workforce. The Department has no discretion to create such an exemption through rulemaking. In addition, the Department does not agree with the commenter that a law that ensures a particular rate of pay for temporary laborers, even if that rate of pay is ultimately in excess of the rate of pay of one or more unionized employees of the third-party client, "undermine[s] the purpose and value of having a union represent the interests of the direct employees [of the third-party client]." The pay rate of the employees of the third-party client are not reduced by virtue of the rate of pay earned by a temporary laborer who is employed by a temporary help service firm. The collectively bargained pay rate of the employee of the third-party client (absent any collectively bargained pay increase or increases) is the same before, during, and after the temporary laborer's assignment.

55. COMMENT: The commenter asks whether "it is the Department's interpretation" that a temporary help service firm that has a contractual relationship with a third-party client that predates the effective date of the TWBR is exempt from the requirements at N.J.S.A. 34:8D-7.b and proposed N.J.A.C. 12:72-7.

56. COMMENT: The commenter asks, "[d]oes [the pay equity provision] only apply to temporary laborers newly assigned to work at a third-party client as of 8/5/23 and thereafter, or does it apply to temporary laborers already contracted to and working with the third-party client on 8/5/23?"

RESPONSE TO COMMENTS 55 AND 56: Pursuant to the TWBR, and in particular, at N.J.S.A. 34:8D-7.b, upon the effective date of the TWBR, "[a]ny temporary laborer **assigned to work** at a third-party client in a designated classification placement shall not be paid less than the average rate of pay and average cost of benefits, or the cash equivalent thereof, of employees of the third-party client performing the same or substantially similar work on jobs the performance of which requires

equal skill, effort, and responsibility, and which are performed under similar working conditions for the third-party **client at the time the temporary laborer is assigned to work** at the third-party client" (emphasis added). Nothing in the TWBR indicates that a temporary help service firm that has a contractual relationship with a third-party client that predates the effective date of the TWBR is exempt from the requirements at N.J.S.A. 34:8D-7.b. Furthermore, "any temporary laborer assigned to work at a third-party client," would include those temporary laborers who had been assigned to work at a third-party client prior to the law's effective date and continued in that assignment through the law's effective date.

57. COMMENT: The commenter asks what is the recommended process for temporary help service firms to "obtain pertinent compensation data" from third-party clients? The commenter asks, "[s]hould firms utilize signed questionnaires detailing positions, pay rates and benefit costs?"

RESPONSE: The proposed new rules set forth no requirement as to how a temporary help service firm and a third-party client must exchange information. Thus, the temporary help service firm and third-party client may use whatever method they prefer, so long as it results in the transfer of the relevant information.

58. COMMENT: The commenter asks, if a temporary help service firm collects relevant information from its third-party client, how long can the information be reliably used for wage parity compliance before needing updates?

59. COMMENT: The commenter suggests that the Department include in the rules a "minimum period—once pay rate and hourly cost of benefits data points have been provided by the [third-party client] to the temporary help service firms—after which the client would update these data points and communicate the updated information in writing to the temporary help service firm(s) currently providing temporary laborers."

RESPONSE TO COMMENTS 58 AND 59: Each time that a temporary help service firm contracts with a third-party client for the services of a temporary laborer to work in a designated classification placement, comparator employees of the third-party client must be identified by the third-party client, the third-party client must provide the temporary help service firm with a listing of the hourly rate of pay and cost per hour of benefits for each comparator employee, and the temporary help service firm must calculate the minimum rate of pay for the temporary laborer using the method outlined at proposed N.J.A.C. 12:72-7.2.

60. COMMENT: The commenter asks, "[w]hat is the acceptable margin of variance—how closely do temporary worker wages need to match the signed client comparative compensation to be compliant?"

RESPONSE: N.J.S.A. 34:8D-7.b says nothing of an acceptable "variance." It simply states that "[a]ny temporary laborer assigned to work at a third-party client in a designated classification placement **shall not be paid less than** the average rate of pay and average cost of benefits, or the cash equivalent thereof, of employees of the third-party client performing the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions for the third-party client at the time the temporary laborer is assigned to work at the third party client" (emphasis added). Each temporary help service firm, therefore, will be required to use the method for calculation of the temporary laborer's rate of pay set forth at proposed N.J.A.C. 12:72-7.2. There will be no acceptable "variance." That said, as mentioned in response to a previous comment, when determining the appropriateness of the administrative penalty to impose for a violation, pursuant to proposed N.J.A.C. 12:72-1.3(i), the Department must consider, among other factors, the good faith of the temporary help service firm or third-party client. Consequently, if the temporary help service firm has made a good faith effort to calculate the required temporary laborer pay rate, that will be taken into consideration by the Department when determining the appropriateness of the administrative penalty.

61. COMMENT: The commenter asks, "[i]f a temporary job has no comparable jobs at the third-party client, how are the cash equivalent benefits calculated?"

RESPONSE: Pursuant to N.J.S.A. 34:8D-7 and proposed N.J.A.C. 12:72-7, if there are no employee or employees of the third-party client performing the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions for the third-party client at the time the temporary laborer is assigned to work at the third-party client, then the requirements at N.J.S.A. 34:8D-7 and N.J.A.C. 12:72-7 do not apply.

62. COMMENT: The commenter states the following:

> "We [a small business manufacturer] use an agency as a payroll service for new hires for typically 30-60 days. The new hire is paid the same wage rate as when they transition to a direct full-time employee, and we pay the agency fee. This arrangement is not because they are 'temporary,' but because it is a probationary trial period. As a completely unskilled, unproven, newbie they have not yet earned the right to benefits. We do not believe there can be a comparable comprehensive pay rate; a direct full-time employee has earned the benefit of benefits. One of our workers, John, has been with the agency way over 60 days, but his attendance is horrible although he is trying to improve for consideration of transition. Is the State trying to force us to fire him by saying he deserves benefits for being late and/or absent?"

RESPONSE: The Department declines to comment on specific situations in the context of a rulemaking without having the ability to fully investigate any particular arrangement. However, if the agency the commenter refers to is a temporary help service firm and the employee is a temporary laborer assigned by the temporary help service firm to work at the commenter's manufacturing business in a designated classification placement, as defined by the TWBR and the proposed new rules, then all of the requirements at N.J.S.A. 34:8D-7.b and proposed N.J.A.C. 12:72-7 would apply.

63. COMMENT: The commenter asks, "[i]s a staffing agency required to increase the hourly rates of temporary workers currently assigned to a third-party client when a new temporary worker is assigned to the client and the pay equity calculation for the new worker results in a higher hourly rate of pay for that worker?"

RESPONSE: The calculation of the minimum rate of pay that the temporary help service firm must pay a temporary laborer is based on the average rate of pay and average cost of benefits of comparator employees of the third-party client. It is not based on the average rate of pay and average cost of benefits of other temporary laborers. Consequently, the pay and cost of benefits for a new temporary laborer assigned to the third-party client should have no impact on the rate of pay of the currently assigned temporary laborer.

64. COMMENT: The commenter asks how a third-party client should calculate the average hourly wage rate of a comparator employee if the employee is paid on a piece-work basis. The commenter recommends that for piece-work employees, the third-party client should multiply the total number of weeks worked by the employee in that year by 40 to obtain the hours worked by the employee, adding, that the employee's regular hourly wages for that same period of time should then be divided by the total hours worked by the employee to obtain the hourly rate of pay for the piece-work employee. The commenter suggests that this method is "similar to the calculation for salaried employees" set forth at proposed N.J.A.C. 12:72-7.2(c).

RESPONSE: The calculation of an average rate of pay for an employee who is paid on a piece-rate basis is not analogous for the purpose of this calculation to an employee who is paid on a salaried basis. Rather, it is more akin to an employee who is paid on an hourly basis. Proposed N.J.A.C. 12:72-72 sets forth no method for calculating the hourly rate of pay for comparator employees who are paid on an hourly basis, because such an employee's rate of pay is already expressed as an hourly rate, so no calculation is necessary. Similarly, as N.J.S.A. 34:8D-7.b requires that a temporary laborer assigned to work at a third-party client in a designated classification placement shall not be paid less that "the average rate of pay," not the average hourly rate of pay, and average cost of benefits (or the cash equivalent thereof) of the third-party client's comparator employees, there is no need to convert the piece rate to an hourly rate. The temporary help service firm should simply pay the temporary laborer the average of the piece rates paid to all identified comparator employees. Then the temporary help service firm should follow the steps enumerated

at proposed N.J.A.C. 12:72-7.2(e) for the calculation of the average cost per hour of benefits of the third-party client's comparator employees, compare that to the cost per hour of benefits for the temporary laborer, and if the former is greater than the latter, make up the difference in an hourly wage rate (in addition to the piece rate) paid to the temporary laborer.

65. COMMENT: The commenter asks whether a third-party client company that "utilize[s]" a "joint-employment relationship with a PEO," must include PEO employees when providing the temporary help service firm with a listing of the hourly rate of pay and cost per hour of benefits for each employee who the third-party client has determined would be a comparator employee.

RESPONSE: Pursuant to N.J.S.A. 34:8-67 et seq., the law governing PEOs; specifically, at N.J.S.A. 34:8-72, "a [PEO] and the respective client companies with which it has entered into employee leasing agreements shall be the co-employers of **their covered employees** for the payment of wages and other employment benefits due" (emphasis added). N.J.S.A. 34:8D-7.b requires that "any temporary laborer assigned to work at a third-party client in a designated classification placement shall not be paid less than the average rate of pay and average cost of benefits, or the cash equivalent thereof, of **employees of the third-party client** performing the same or substantially similar work …" (emphasis added). Consequently, it is the Department's understanding that where a third-party client has entered into an employee leasing agreement with a PEO it must only include among the comparator employees whose wages and cost of benefits will be the basis for the calculation of the rate of pay that the temporary help service firm must pay the temporary laborer pursuant to N.J.S.A. 34:8D-7 and proposed N.J.A.C. 12:72-7: 1. employees of the third-party client who it employs and who are not covered under the employee leasing agreement; and 2. employees of the third-party client who are co-employed by the third-party client and the PEO pursuant to the employee leasing agreement. The third-party client is not required to include employees of the PEO who are not covered by the employee leasing agreement with the third-party client; that is, employees of the PEO who are co-employed by the PEO and other clients of the PEO, because those individuals are not "employees of the third-party client."

N.J.A.C. 12:72-9.1 Detailed Itemized Statement

66. COMMENT: The commenter objects to the requirement at proposed N.J.A.C. 12:72-9.1(a)7 and 8, that the temporary help service firm include the following information within the detailed itemized statement provided to each temporary laborer with the temporary laborer's wages: (1) the total amount charged by the temporary help service firm to the third-party client for the services of the temporary laborer during that pay period; and (2) the total cost to the temporary help service firm of benefits provided to the temporary laborer during that pay period. The commenter characterizes this information as "financial data points," that should not be required to be disclosed to the temporary laborer, and the commenter suggests that N.J.A.C. 12:72-9.1(a)7 and 8 should be deleted. The commenter asserts that N.J.S.A. 34:8D-6.a does not expressly require inclusion of this information within the detailed itemized statement, "meaning the Department has unilaterally chosen that this information be shared," and claims that to require the inclusion of this information for each temporary laborer on the temporary laborer's detailed itemized statement would be inconsistent with proposed N.J.A.C. 12:72-4.3(b). That proposed new subsection pertains to the recordkeeping requirements for temporary help service firms and their responsibility to make certain of those records available for inspection by temporary laborers and their representatives. Pursuant to N.J.A.C. 12:72-4.3(b), excluded from the records the temporary help service firm must make available for inspection by temporary laborers and their representatives are: (1) any specific qualifications or attributes of a temporary laborer that were requested by the third-party client for the assignment; (2) copies of the contract(s) with the third-party client for the assignment; and (3) copies of any invoice(s) provided by the temporary help service firm to the third-party client for payment in relation to the assignment.

RESPONSE: The items excluded from the inspection requirement at proposed N.J.A.C. 12:72-4.3(b) are required by statute to be so excluded. That is, N.J.S.A. 34:8D-4.b indicates with regard to the records that a temporary help service firm must maintain pursuant to N.J.S.A. 34:8D-4.a, that only those "described in paragraphs (1), (2), (3), (6), (7) and (8) of subsection a." must be made available for review and copying to temporary laborers and their authorized representatives. Excluded from that list are the records described at N.J.S.A. 34:8D-4.a(4) and (5), which are: (1) "any specific qualifications or attributes of a temporary laborer, requested by each third-party client," (2) "copies of all contracts, if any, with the third-party client," and (3) "copies of all invoices for the third-party client." Proposed N.J.A.C. 12:72-4.3(b) mirrors N.J.S.A. 34:8D-4.b.

N.J.A.C. 12:72-9.1(a) lists the information that must be included by the temporary help service firm within the "detailed itemized statement" that accompanies each payment of wages to a temporary laborer. N.J.S.A. 34:8D-6.a requires that such a "detailed itemized statement" be provided to each temporary laborer and lists five specific categories of information that must be included, which appear at N.J.S.A. 34:8D-6.a(1) through (5), followed by N.J.S.A. 34:8D-6.a(6), which states that the "detailed itemized statement" shall also include "any additional information required by the Commissioner."

It is true, as the commenter observes, that proposed N.J.A.C. 12:72-9.1(a)1 through 6, mirror N.J.S.A. 34:8D-6.a(1) through (5) and that proposed N.J.A.C. 12:72-9.1(a)7 and 8, are not expressly listed in the statute among the required items for inclusion in the "detailed itemized statement." However: (1) N.J.S.A. 34:8D-6.a(6) expressly authorizes the Commissioner to require the inclusion by temporary help service firms of "additional information" in the "detailed itemized statement"; and (2) the exclusion at proposed N.J.A.C. 12:72-4.3(b), of: (a) "any specific qualifications or attributes of a temporary laborer, requested by each third-party client," (b) "copies of all contracts, if any, with the third-party client," and (c) "copies of all invoices for the third-party client" from the records that the temporary help service firm must make available to all temporary laborers and their authorized representatives, is not at all inconsistent with proposed N.J.A.C. 12:72-9.1(a)7 and 8, which require that the "detailed itemized statement" provided to each individual temporary laborer include the "total amount charged by the temporary help service firm to the third-party client for the services of the temporary laborer during that pay period," and the "total cost to the temporary help service firm of benefits provided to the temporary laborer during that pay period." Proposed N.J.A.C. 12:72-9.1(a)7 and 8 require only that an individual temporary laborer be provided at the time of wage payment with the total amount charged by the temporary help service firm to the third-party client for that temporary laborer during that pay period, and the total cost to the temporary help service firm of benefits provided to that temporary laborer during that pay period. The latter information, which proposed N.J.A.C. 12:72-9.1(a)7 and 8 would require be provided to each individual temporary laborer with each wage payment, along with other information included in the "detailed itemized statement," is information that each temporary laborer must possess in order to independently confirm compliance by the temporary help service firm with the pay equity requirements at N.J.S.A. 34:8D-7 and proposed N.J.A.C. 12:72-7. Finally, neither of the latter two pieces of information that proposed N.J.A.C. 12:72-9.1(a)7 and 8 would require be included within the "detailed itemized statement," relate to "specific qualifications or attributes of a temporary laborer that were requested by the third-party client." Thus, there is no inconsistency between either N.J.A.C. 12:72-9.1(a)7 or 8 and the exclusion at proposed N.J.A.C. 12:72-4.3(b) of "specific qualifications or attributes of a temporary laborer that were requested by the third-party client," from the records that must be made available by the temporary help service firm to all temporary laborers and their authorized representatives.

67. COMMENT: The commenter observes that N.J.S.A. 34:8D-6.a(6), regarding the "detailed itemized statement" allows the Commissioner to require the inclusion of "additional information"; that is, information in addition to the items listed at N.J.S.A. 34:8D-6.a(1) through (5). The commenter asks, "[h]ow often will the Commissioner update the information needed on the ["detailed itemized statement"], how much notice will be provided to the [temporary help service firms], and how long will they have to comply with such updates?"

RESPONSE: As indicated in response to a prior comment, proposed N.J.A.C. 12:72-9.1(a) sets forth a list of the information required to be included in the "detailed itemized statement." As also referenced in the response to a prior comment, proposed N.J.A.C. 12:72-9.1(a)1, through 6,

mirror the requirements at N.J.S.A. 34:8D-6.a(1) through (6), and proposed N.J.A.C. 12:72-9.1(a)7 and 8 list "additional information" required by the Commissioner. Notice and comment rulemaking pursuant to N.J.S.A. 52:14B-1 et seq., the New Jersey Administrative Procedure Act (APA), is the method by which the Commissioner is requiring inclusion on the "detailed itemized statement" of this additional information (and will be the method in the future if any changes are necessary).

68. COMMENT: The commenter states the following:

> "There's a provision in [N.J.S.A. 34:8D-6(b) that says, 'Except as otherwise authorized pursuant to this section, a temporary help service firm shall not withhold or divert the wages of a temporary laborer in a designated classification placement for any reason.' The remaining section does not specify that firms are permitted to withhold for benefits like medical, dental, 401(k), etc. They are required to offer benefits at an affordable rate under the ACA and those benefits come with an affordable withholding to temporary associates. Can this section be updated to allow for benefit withholdings that the employee permits in writing?"

RESPONSE: The Department does not have the ability to amend the statute. That said, N.J.S.A. 34:8D-6.c, does require that the wages of temporary laborers shall be paid in accordance with N.J.S.A. 34:11-4.1 et seq., the State Wage Payment Law (WPL). N.J.S.A. 34:11-4.4 within the WPL addresses withholding from wages, allowing an employer to withhold or divert wages only under certain limited circumstances, such as where the employer is required or empowered to do so by New Jersey or United States law. Other permissible withholdings from the wages of employees pursuant to the WPL include, but are not limited to, "contributions authorized either in writing by employees or under a collective bargaining agreement to employee welfare, insurance, hospitalization, medical or surgical or both, pension, retirement and profit-sharing plans …"

69. COMMENT: The commenter suggests that temporary help service firms be permitted to include additional information within the "detailed itemized statement."

RESPONSE: Temporary help service firms should include within the "detailed itemized statement," the information required at proposed N.J.A.C. 12:72-91(a). N.J.S.A. 34:8D-6.a permits the "detailed itemized statement" to be provided "on the temporary laborer's paycheck stub or on a form approved by the Commissioner." If the temporary help service firm uses the temporary laborer's paycheck stub to relay the information required on the "detailed itemized statement," then the temporary help service firm may certainly include whatever additional information that it wishes to on the paycheck paystub. However, the information required on the "detailed itemized statement" should be relayed discretely within the paycheck paystub, as required, without any obfuscation. Similarly, if the temporary help service firm uses the form provided by the Commissioner to provide the "detailed itemized statement," it may include additional information, so long as the required information is relayed discretely without any obfuscation.

70. COMMENT: The commenter requests that proposed N.J.A.C. 12:72-9.1(a)6 be deleted. That paragraph requires that the "detailed itemized statement" include "[t]he current maximum amount of a placement fee under N.J.A.C. 12:72-6.2(c), which the temporary help service firm may charge to the third-party client to directly hire the temporary laborer."

RESPONSE: N.J.S.A. 34:8D-6.a(5) expressly requires that the "detailed itemized statement" include "the current maximum amount of a placement fee which the temporary help service firm may charge to a third-party client to directly hire the temporary laborer pursuant to subsection a., of section 7, of P.L. 2023, c. 10 (C.34:8D-7)." The Department has no discretion to deviate from this statutory mandate.

71. COMMENT: Regarding proposed N.J.A.C. 12:72-9.1(a)7, which requires inclusion within the "detailed itemized statement," of "[t]he total amount charged by the temporary help service firm to the third-party client for the services of the temporary laborer during that pay period," the commenter states the following:

> [I]f this is required, the bill rate data associated with work hours are not generally retained in the payroll portion of the in-house staffing firm or third-party vendor payroll systems. As stated earlier, major system modifications would be necessary to calculate and provide this information, obviously delaying the industry's ability to comply. Furthermore, we respectfully request that, when the data is available, the regulation specify that the temporary help service firm would be required to report only the total billing associated with the work hours reported in the pay period, whether the pay period involves one or many third-party clients.

RESPONSE: A temporary help service firm, whose revenue is derived from the charging of third-party clients for the services of its temporary workers, should have readily available the amounts billed to its third-party clients for the services provided by each temporary laborer on each assignment during any given two-week period. The Department accepts as true, the commenter's statement that certain systems modification(s) may be necessary in order to include the required information on the "detailed itemized statement," However, this is information, along with certain other information required on the "detailed itemized statement," that the temporary laborer must have to independently confirm that the temporary help service firm is complying with the law and rules.

72. COMMENT: Regarding proposed N.J.A.C. 12:72-9.1(a)8, which requires inclusion within the "detailed itemized statement" of "[t]otal cost to the temporary help service firm of benefits provided to the temporary laborer during that pay period," the commenter states the following:

> [W]e respectfully request the Department agree that with the listing on the form as recommended of actual benefit payments in the pay period like vacation, holiday pay, etc., will meet this requirement and no further information is needed.

RESPONSE: The Department does not agree. As explained in Response to Comment 70, the information required; in this instance, the total cost to the temporary help service firm of benefits provided to the temporary laborer during that pay period, is, along with certain other information required on the "detailed itemized statement," information that the temporary laborer must have in order to independently confirm that the temporary help service firm is complying with the law and rules.

73. COMMENT: The commenter requests changes to language at proposed N.J.A.C. 12:72-9.1(a), regarding the requirements of the "detailed itemized statement," that was taken verbatim from N.J.S.A. 34:8D-6.a. For example, the commenter requests that proposed N.J.A.C. 12:72-9.1(a)2 be changed from "The number of hours worked by the temporary laborer at each third-party client on each day during that pay period," to "The number of hours worked by the temporary laborer at each third-party client for each work week's ending date that is reported in the pay period."

RESPONSE: As indicated by the commenter, the language at N.J.A.C. 12:72-9.1(a)2, is taken verbatim from the statute. The Department declines to make the changes suggested by the commenter.

74. COMMENT: The commenter requests, "the Department make clear in its regulations" that if a temporary help service firm will not be charging a placement fee with regard to a particular temporary laborer or has a "global policy" to not charge placement fees, that it not be required to include within the "detailed itemized statement," the current maximum amount of a placement fee, which the temporary help service firm may charge to the third-party client to directly higher the temporary laborer.

RESPONSE: N.J.S.A. 34:8D-6.a(5) expressly requires inclusion within the "detailed itemized statement" of the maximum placement fee. The law contains no exceptions.

N.J.A.C. 12:72-9.2 Work Verification; Third-Party Client

75. COMMENT: The commenter states the following:

> "The Act and the rule proposal require that when a temporary laborer is assigned to work a single day (as opposed to a multi-day assignment), the third-party client shall, at the end of the work day, provide the temporary laborer with a work verification form providing certain information See N.J.S.A. 34:8D-6a; Rule Proposal at N.J.A.C. 12:72-9.2. There are situations where a temporary laborer is assigned to a multi-day assignment, but unbeknownst to the temporary help service firm or the third-party client, may not return to the third-party client site after the first day. The Department should clarify in

> the Rule Proposal that the single-day work assignment verification is not required to be provided when a temporary laborer, who has a multi-day assignment, does not return after the first day and does not inform the temporary help service firm or the third-party client of their intent to not return after the first day of their assignment."

RESPONSE: N.J.S.A. 34:8D-6.a states in pertinent part that "[f]or each temporary laborer in a designated classification placement **who is contracted to work a single day**, the third-party client shall, at the end of the work day, provide such temporary laborer with a work verification form, approved by the Commissioner …" (emphasis added). Proposed N.J.A.C. 12:72-9.2(a) states that, "[f]or the temporary laborer **who is assigned to work a single day** (as opposed to a multi-day assignment), the third-party client shall, at the end of the work day, provide the temporary laborer with a work verification, using the form made available at that time on the Department website at …" (emphasis added). Thus, it is clear from the existing statutory and proposed regulatory language that the single-day work verification requirement does not apply when the temporary laborer has been contracted or assigned by the temporary help service firm to work for the third-party client for more than one day, regardless of whether the temporary laborer only shows up at the third-party client to work for one day of a multi-day assignment. No change to the proposed new rules is necessary.

76. COMMENT: The commenter recommends that the Department allow the work verification form to include a place for the temporary laborer to sign with additional language added by the temporary help service firm to allow the form to also act as a daily time sheet.

RESPONSE: This is a form that will be completed by the third-party client and provided directly to the temporary laborer only for single-day assignments. The statute does not call for any role to be played regarding this form, including the adding of "additional language," by the temporary help service firm. Furthermore, the commenter's suggestion that the work verification form "also act as a daily time sheet," is impractical since it is only required for single-day assignments.

N.J.A.C. 12:72-9.3 Annual Earnings Summary

77. COMMENT: Regarding the requirement at proposed N.J.A.C. 12:72-9.3 that within a reasonable time after the preceding calendar year, but in no case later than February 1 of the current calendar year, a temporary help service firm must provide a temporary laborer with an annual earning summary for the preceding calendar quarter, and at the time the temporary help service firm pays the temporary laborer their wages, the temporary help service firm must individually provide the temporary laborer with notice of the availability of the annual earnings summary (with an alternative to post notice of the availability of the annual earnings summary in a conspicuous place in the public reception area of the temporary help service firm), the commenter states the following:

> "Because the law did not provide any details regarding the nature and content of this "earnings summary," we respectfully suggest that the regulations stipulate that providing (and communicating its availability as proposed in the regulations) the Annual Wage and Tax Statement (W-2 Form) by February 1, meets this sections requirements."

RESPONSE: Proposed N.J.A.C. 12:72-9.3 is taken from N.J.S.A. 34:8D-6.b. To the commenter's point, neither the law, nor the rule, dictates the use of any particular form for the "annual earnings summary." Consequently, the temporary help service firm may use whichever form it chooses, so long as it relays annual earnings to the temporary laborer within the specified timeframe. No change to the proposed new rules is necessary.

N.J.A.C. 12:72-9.7 Non-Utilization; Change in Worksite

78. COMMENT: Regarding proposed N.J.A.C. 12:72-9.7(a), which requires that when a temporary help service firm has contracted with a third-party client for a temporary laborer to perform work at a worksite of the third-party client and the temporary laborer is not utilized, the temporary help service firm shall pay the temporary laborer a minimum of four hours of pay at the agreed upon rate of pay, the commenter states the following:

> "We respectfully request that the proposed regulation state that this section is essentially a modification in the application of current NJDOL regulations 12:56-5.5 (Reporting for Work) as it pertains to those covered by this law and the proposed regulations. When a temporary laborer shows up at the client site and there is no work, the current regulation [N.J.A.C. 12:56-5.5] requires the payment of one-hour of pay. Section 12:72-9.7(a) essentially increases this payment to four hours of pay at the agreed-upon rate of pay unless 12:72-9.7(b) applies. By referencing 12:56-5.5, the circumstances where 12:56-55 would apply are the same for 12:72-9.7(a) and no new circumstances are being added that would be eligible for this additional pay."

RESPONSE: Proposed N.J.A.C. 12:72-9.7 is taken from N.J.S.A. 34:8D-6.g, which applies specifically to temporary laborers who are contracted by a temporary help service firm to work at a third-party client's worksite in a designated classification placement. The requirement within the statute, at N.J.S.A. 34:8D-6.g, that such temporary laborers who are not utilized by the third-party client, shall be paid by the temporary help service firm for a minimum of four hours of pay at the agreed upon rate of pay, supersedes a Departmental rule of general applicability, that says an employee who by request of the employer reports for duty on any day shall be paid for at least one hour at the applicable wage rate. No change to proposed N.J.A.C. 12:72-9.7 is necessary.

79. COMMENT: The commenter suggests that the underlined text be added at proposed N.J.A.C. 12:72-9.7(a), "When a temporary help service firm has contracted with a third-party client to perform work at a worksite of the third-party client and the temporary laborer <u>who reports to the worksite</u> is not utilized <u>at the worksite or another worksite for the same third-party client in the same general location</u> (that is, the temporary laborer does not work), the temporary help service firm shall pay the temporary laborer a minimum of four hours of pay at the agreed upon rate of pay."

RESPONSE: The changes suggested by the commenter are inconsistent with N.J.S.A. 34:8D-6.g, which states that the obligation to pay the non-utilization fee is triggered when the temporary laborer who is contracted to work at the third-party client's worksite "is not utilized by the third-party client." The law says nothing of a requirement that to be paid the fee, the temporary laborer must report to the worksite and then not be utilized, nor does the statute contain the other language suggested by the commenter. The changes to proposed N.J.A.C. 12:72-9.7 that are suggested by the commenter will not be made.

N.J.A.C. 12:72-10.2 Complaints to Commissioner

80. COMMENT: The commenter asks, specifically with regard to proposed N.J.A.C. 12:72-10.2(a), whether if one "organization" discovers that "another company" has violated the TWBR or this chapter, can that organization report the violation to the Department.

RESPONSE: Proposed N.J.A.C. 12:72-10, Third-Party Payments to Temporary Help Service Firm, including proposed N.J.A.C. 12:72-10.2(a), pertains exclusively to the requirement at N.J.S.A. 34:8D-6.h that a third-party client reimburse a temporary help service firm the wages and related payroll taxes for services performed for a third-party client by a temporary laborer in a designated classification placement. Thus, when, at proposed N.J.A.C. 12:72-10.2(a), it states that "[a] temporary help service firm may file a complaint with the Commissioner that a third-party client has violated N.J.A.C. 12:72-10.1," that is referring exclusively to the right of a temporary help service firm to file a complaint with the Commissioner that a third-party client has failed to reimburse a temporary help service firm wages and related payroll taxes for services performed for a third-party client by a temporary laborer in a designated classification placement. See N.J.S.A. 34:8D-6.b ("[t]he Commissioner shall review a complaint filed by a temporary help service firm that makes designated classification placements against a third-party client," and "shall review the payroll and accounting records of the temporary help service firm … to determine if wages and payroll taxes have been paid to the temporary help service firm and that the temporary laborer has been paid the wages owed"). The Department does not seek, at proposed N.J.A.C. 12:72-10.2(a), to address **all** complaints that may be filed with

the Commissioner; it **only**, as required at N.J.S.A. 34:8D-6.h, seeks, at proposed N.J.A.C. 12:72-10.2(a), to address those complaints that pertain to the requirement that a third-party client reimburse a temporary help service firm wages and related payroll taxes for services performed for a third-party client by a temporary laborer in a designated classification placement. Any individual or organization may at any time file a complaint with the Department that there has been a violation of the TWBR or this chapter, just as any individual or organization may at any time file a complaint with the Department that there has been a violation of the Wage and Hour Law, N.J.S.A. 34:11-56a et seq., or any of the other laws that the Department enforces. Proposed N.J.A.C. 12:72-1.5, Processing of complaints, expressly states that "[a]ny complaint filed with the Division that alleges a violation of the [TWBR] or this chapter shall be processed in the same manner as a complaint filed with the Division [of Wage and Hour Compliance] under the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a et seq., and the rules promulgated thereunder." Such complaints may even be filed anonymously.

Other Comments Not Related To Any Specific Proposed New Rule

81. COMMENT: The commenter states the following:

"N.J.S.A. 34:8D-8(a) says that firms must pay a 'non-refundable fee not to exceed $750.oo per year for each branch office or other location where the temporary help service firm regularly conducts its business, including but not limited to contracting with and recruiting with temporary laborers for designated classification placement services.' Does this mean it includes when they operate out of the unemployment offices on a monthly basis? Does it also mean that they need to pay this fee for every client location they have an onsite manager because they are conducting business in the client location?"

RESPONSE: The Department of Labor and Workforce Development does not enforce N.J.S.A. 34:8D-8. That section of the TWBR is enforced by the Division of Consumer Affairs, within the Department of Law and Public Safety. Consequently, the Department of Labor and Workforce Development cannot respond to this comment.

82. COMMENT: The commenter states the following:

"Both the Act (N.J.S.A. 34:8D-10(c) and the regulations (N.J.A.C. 12:72-1.3(i)(3)) contemplate the employer's good faith as a factor in determining assessing administrative penalties pursuant to the Act. Yet Section 11 of the Act which authorizes civil and class actions has no corresponding provisions. Given the potential damages and exposure for what amounts to the same alleged violation we respectfully request that a regulation should be published which offers the same consideration. We proposed a new regulation—N.J.A.C. 12:72-1.6 (Civil Actions) be added which states that, 'When determining the amount of the penalty and liability imposed against an employer because of a violation, the Superior court shall consider factors which include the history of previous violations by the employer, seriousness of the violation, the good faith of the employer, and the size of the employer's business.'"

RESPONSE: The Department does not possess the statutory authority to promulgate a rule such as the one suggested by the commenter.

83. COMMENT: Multiple commenters expressed support for the proposed new rules.

RESPONSE: The Department thanks the commenters for their support.

Summary of Agency-Initiated Change Upon Adoption:

The Department is adding N.J.A.C. 12:72-7.2(f) upon adoption, which would state that under no circumstances should the calculation of the rate that the temporary help service firm must pay the temporary laborer pursuant to N.J.S.A. 34:8D-7.b or N.J.A.C. 12:72-7 ever result in the temporary laborer earning less than the minimum hourly wage rate required pursuant to N.J.S.A. 34:11-56a4 and N.J.A.C. 12:56.

Federal Standards Statement

The adopted 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.

Full text of the adopted new rules follows (additions to the proposal are indicated in boldface with asterisks ***thus***):

CHAPTER 72
TEMPORARY LABORERS

SUBCHAPTER 1. GENERAL PROVISIONS

12:72-1.1 Purpose and scope

(a) The purpose of this chapter is to implement N.J.S.A. 34:8D-1 through 7, and 10 (the Act), which set forth workplace protections, as well as temporary help service firm and third-party client responsibilities, that are enforced by the Department of Labor and Workforce Development for the benefit of temporary laborers.

(b) This chapter is applicable to each temporary help service firm that is located, operates, or transacts business, within New Jersey.

(c) This chapter is applicable to each temporary laborer who is employed by a temporary help service firm referred to at (b) above, who also either has been assigned by the temporary help service firm to work in a designated classification placement:

1. Within New Jersey, or

2. Outside of New Jersey, but who has his or her primary residence in New Jersey.

(d) This chapter applies to each third-party client that contracts with a temporary help service firm referred to at (b) above, for the services of a temporary laborer referred to at (c) above.

12:72-1.2 Retaliation prohibited

(a) No temporary help service firm or third-party client, or agent of a temporary help service firm or third-party client, shall retaliate through discharge or in any other manner against a temporary laborer for exercising any rights granted the temporary laborer pursuant to N.J.S.A. 34:8D-1 et seq., or this chapter, including, but not limited to, the following:

1. Making a complaint to a temporary help service firm, to a third-party client, to a co-worker, to a community organization, before a public hearing, or to a State or Federal agency whose rights guaranteed pursuant to N.J.S.A. 34:8D-1 et seq., have been violated;

2. Instituting any proceeding pursuant, or related, to N.J.S.A. 34:8D-1 et seq.; and

3. Testifying, or preparing to testify, in an investigation or proceeding pursuant to N.J.S.A. 34:8D-1 et seq.

(b) When within 90 days of the temporary laborer's exercise of rights protected pursuant to N.J.S.A. 34:8D-1 et seq., a temporary help service firm either terminates the temporary laborer's employment or takes any disciplinary action against the temporary laborer, there shall arise a rebuttable presumption that the termination or other disciplinary action was in retaliation for the temporary laborer's exercise of rights.

12:72-1.3 Administrative penalties

(a) When the Commissioner finds that a temporary help service firm has violated any requirement(s) set forth at N.J.S.A. 34:8D-3 or N.J.A.C. 12:72-3, the Commissioner is authorized to assess and collect an administrative penalty against the temporary help service firm for each violation in an amount not less than $500.00 and not to exceed $1,000.

(b) When the Commissioner finds that a third-party client has violated any requirement(s) set forth at N.J.S.A. 34:8D-4.a(2) or N.J.A.C. 12:72-4.2, the Commissioner is authorized to assess and collect an administrative penalty against the third-party client for each violation in an amount not to exceed $500.00.

1. The third-party client's failure to remit accurate time records to the temporary help service firm as required at N.J.S.A. 34:8D-4.a(2) or N.J.A.C. 12:72-4.2 shall not constitute a violation of that law or that rule and shall not be the basis for the assessment or collection of an administrative penalty against the third-party client when the third-party client has been precluded from submitting those time records for reasons beyond its control.

(c) When the Commissioner finds that a temporary help service firm has violated the requirements set forth at N.J.S.A. 34:8D-5.d(2) or N.J.A.C. 12:72-4.1(b), that it obtain, and keep on file, documentation that any provider of transportation to temporary laborers with which the

temporary help service firm contracts or to which the temporary help service firm makes referrals, is in compliance with N.J.S.A. 34:8D-5.e, f, and g, the Commissioner is authorized to assess and collect an administrative penalty against the temporary help service firm for each violation in an amount not to exceed $500.00.

(d) When the Commissioner finds that a temporary help service firm has violated any requirement(s) set forth at N.J.S.A. 34:8D-5 (with the exception of N.J.S.A. 34:8D-5.d(2)), or N.J.A.C. 12:72-5, the Commissioner is authorized to assess and collect an administrative penalty against the temporary help service firm for each violation in an amount not to exceed $5,000.

(e) When the Commissioner finds that a temporary help service firm has violated any requirement(s) set forth at N.J.S.A. 34:8D-6 or N.J.A.C. 12:72-8 or 9, the Commissioner is authorized to assess and collect an administrative penalty against the temporary help service firm for each violation in an amount not to exceed $500.00.

(f) When the Commissioner finds that a third-party client has violated the work verification requirement set forth at N.J.S.A. 34:8D-6.a or N.J.A.C. 12:72-9.2, the Commissioner is authorized to assess and collect an administrative penalty against the third-party client for each violation in the following amounts:

1. First violation—not to exceed $500.00; and

2. Second and subsequent violations—not to exceed $2,500.

(g) When the Commissioner finds that a temporary help service firm has violated any requirement(s) set forth at N.J.S.A. 34:8D-7 or N.J.A.C. 12:72-6.1, 6.2, 7.1, or 7.2, the Commissioner is authorized to assess and collect an administrative penalty against the temporary help service firm for each violation in an amount not to exceed $5,000.

1. If a third-party client leases or contracts with a temporary help service firm for the services of a temporary laborer, the third-party client and the temporary help service firm shall be jointly and severally responsible for a violation of the requirements set forth at N.J.S.A. 34:8D-7 or N.J.A.C. 12:72-6.1, 6.2, 7.1, or 7.2, including, with respect to any administrative penalty assessed by the Commissioner pursuant to this subsection for any such violation(s).

(h) When the Commissioner finds that a temporary help service firm or third-party client has violated any requirement(s) set forth at N.J.S.A. 34:8D-10 or N.J.A.C. 12:72-1.2, the Commissioner is authorized to assess and collect an administrative penalty against the temporary help service firm or the third-party client, as appropriate, for each violation in the following amounts:

1. First violation—not to exceed $250.00; and

"Designated classification placement" means an assignment of a temporary laborer by a temporary help service firm to perform work in any of the following occupational categories as designated by the Bureau of Labor Statistics of the United States Department of Labor:

33-9099 Other Protective Service Workers;

35-0000 Food Preparation and Serving Related Occupations;

37-0000 Building and Grounds Cleaning and Maintenance Occupations;

39-0000 Personal Care and Service Occupations;

47-2060 Construction Laborers;

47-3019 Helpers, Construction Trades;

49-0000 Installation, Maintenance, and Repair Occupations;

51-0000 Production Occupations; and

53-0000 Transportation and Material Moving Occupations.

2. Second and subsequent violations—not to exceed $500.00.

(i) In assessing an administrative penalty pursuant to this section, the Commissioner shall consider the following factors, where applicable, in determining what constitutes an appropriate penalty for the particular violation(s):

1. The seriousness of the violation(s);

2. The past history of violations by the temporary help service firm or third-party client, as appropriate;

3. The good faith of the temporary help service firm or third-party client, as appropriate;

4. The size of the temporary help service firm's or third-party client's business, as appropriate; and

5. Any other factors that the Commissioner deems appropriate in determining the penalty assessed.

12:72-1.4 Hearings

(a) When the Commissioner assesses an administrative penalty pursuant to N.J.A.C. 12:72-1.3, the temporary help service firm or third-party client against which the administrative penalty has been assessed shall have the right to a hearing pursuant to (b) below.

(b) No administrative penalty shall be levied pursuant to N.J.A.C. 12:72-1.3 unless the Commissioner provides the alleged violator with notification by certified mail of the violation and the amount of the penalty and an opportunity to request a formal hearing. A request for a formal hearing must be received within 15 business days following receipt of the notice. All hearings shall be held pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedures Rules, N.J.A.C. 1:1.

(c) All requests for hearings will be reviewed by the Division of Wage and Hour and Contract Compliance to determine if the dispute may be resolved at an informal settlement conference. If, following its review, the Division determines that an informal settlement conference is warranted, such conference will be scheduled. If a settlement cannot be reached, the case will be forwarded to the Office of Administrative law for a formal hearing.

(d) The Commissioner shall make the final decision of the Department.

(e) If the temporary help service firm or third-party client fails to request a formal hearing within 15 days following receipt of the notice, the notice shall become a final order.

(f) Appeals of the final decision of the Commissioner pursuant to (d) above or a final order pursuant to (e) above shall be made to the Appellate Division of the New Jersey Superior Court.

12:72-1.5 Processing of complaints

Any complaint filed with the Division that alleges a violation of the Act or this chapter shall be processed in the same manner as a complaint filed with the Division pursuant to the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a et seq., and the rules promulgated thereunder.

SUBCHAPTER 2. DEFINITIONS

12:72-2.1 Definitions

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

"Act" means N.J.S.A. 34:8D-1 through 7 and 10.

"Benefits" means employee fringe benefits, including, but not limited to, health insurance, life insurance, disability insurance, paid time off (including vacation, holidays, personal leave, and sick leave in excess of what is required by law), training, and pension. The term "benefits" does not include employee fringe benefits that an employer is required by law to provide to its employees (for example, earned sick leave pursuant to N.J.S.A. 34:11D-1 et seq.).

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

"Comparator employee" means an employee of the third-party client to which the temporary laborer is assigned, who is performing the same, or substantially, similar work to that of the temporary laborer at the time the temporary laborer is assigned to the third-party client, on a job the performance of which requires equal skill, effort, and responsibility to that of the temporary laborer, and which is performed under similar working conditions.

"Designated classification placement" means an assignment of a temporary laborer by a temporary help service firm to perform work in any of the following occupational categories as designated by the Bureau of Labor Statistics of the United States Department of Labor:

33-9099 Other Protective Service Workers;

35-0000 Food Preparation and Serving Related Occupations;

37-0000 Building and Grounds Cleaning and Maintenance Occupations;

39-0000 Personal Care and Service Occupations;

47-2060 Construction Laborers;

47-3019 Helpers, Construction Trades;

49-0000 Installation, Maintenance, and Repair Occupations;

51-0000 Production Occupations; and

53-0000 Transportation and Material Moving Occupations.

"Division" means the Division of Wage and Hour and Contract Compliance.

"Employ" means to suffer or permit to work for compensation, including by means of ongoing contractual relationships in which the employer retains substantial direct or indirect control over the employee's employment opportunities or terms and conditions of employment.

"Employer" means any person or corporation, partnership, individual proprietorship, joint venture, firm, company, or other similar legal entity who engages the services of an employee and who pays the employee's wages, salary, or other compensation, or any person acting directly or indirectly in the interest of an employer in relation to an employee.

"Hours worked" means all of the time that the employee is required to be at the employee's place of work or on duty. Nothing at N.J.S.A. 34:8D-1 et seq., requires an employer to pay an employee for hours the employee is not required to be at the employee's place of work because of holidays, vacation, lunch hours, illness, and similar reasons.

"Person" means any natural person or their legal representative, partnership, corporation, company, trust, business entity, or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee, or beneficiary of a trust thereof.

"Primary residence" means a dwelling where a person usually lives and does not include second homes. A person may only have one primary residence at any given time.

"Temporary help service firm" means any person or entity who operates a business that consists of employing individuals directly or indirectly for the purpose of assigning the employed individuals to assist the firm's customers in the handling of the customer's temporary, excess, or special workloads, and who, in addition to the payment of wages or salaries to the employed individuals, pays Federal Social Security taxes and State and Federal unemployment insurance; carries workers' compensation insurance as required by State law; and sustains responsibility for the actions of the employed individuals while they render services to the firm's customers. A temporary help service firm is required to comply with the provisions at N.J.S.A. 56:8-1 et seq.

"Temporary laborer" means a person who contracts for employment in a designated classification placement with a temporary help service firm. Temporary laborer does not include agricultural crew leaders who are registered pursuant to the Federal Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801 et seq., of N.J.S.A. 34:8A-7 et seq., or 34:9A-1 et seq.

"Third-party client" means any person who contracts with a temporary help service firm for obtaining temporary laborers in a designated classification placement. The term "third-party client" does not include the State or any office, department, division, bureau, board, commission, agency, or political subdivision thereof that utilizes the services of temporary help service firms.

SUBCHAPTER 3. REQUIRED NOTICES FROM TEMPORARY HELP SERVICE FIRM TO TEMPORARY LABORER

12:72-3.1 Assignment notification statement at dispatch

(a) At the time a temporary help service firm dispatches a temporary laborer to work in a designated classification placement, the temporary help service firm shall provide the temporary laborer with an assignment notification statement using the form made available at that time on the Department website at https://www.nj.gov/labor/wageandhour/.

1. The Commissioner will not accept applications from temporary help service firms for approval of other assignment notification statement forms.

2. The Commissioner, using the Department website in the manner described at (a) above, will publish a single approved assignment notification form, which the Commissioner may amend from time to time.

(b) The assignment notification statement at (a) above shall be provided by the temporary help service firm to the temporary laborer in English and in the language identified by the employee as the employee's primary language.

(c) The assignment notification statement at (a) above shall be provided by the temporary help service firm to the temporary laborer in a manner appropriate to whether the assignment is accepted at the temporary help service firm's office, or remotely by telephone, text, email, or other electronic exchange.

1. Where the assignment is accepted and dispatch to the assignment occurs remotely by text, email, or other electronic exchange, the temporary help service firm shall provide the temporary laborer with the assignment notification statement (and obtain acknowledgment of receipt of the assignment notification statement if the temporary help service firm intends to do so) by text, email, or other electronic exchange, and may not require the temporary laborer to travel to the office of the temporary help service firm solely to receive or acknowledge receipt of the assignment notification statement.

2. Where the assignment is accepted and dispatch to the assignment occurs remotely by telephone, the temporary help service firm shall provide the temporary laborer the option of receiving the assignment notification statement (and acknowledging receipt of the assignment notification statement if the temporary help service firm intends to do so) either:

i. By text, email, or other electronic exchange; or

ii. By traveling to the office of the temporary help service firm and receiving (and acknowledging receipt of) the assignment notification statement in-person.

3. Where the assignment is accepted and dispatch to the assignment occurs in-person at the office of the temporary help service firm, the temporary help service firm shall provide the temporary laborer with the assignment notification statement (and obtain acknowledgement of receipt of the assignment notification statement if the temporary help service firm intends to do so) in-person at the office of the temporary help service firm.

(d) When the temporary laborer is assigned to the same assignment for more than one day (a multi-day assignment), the temporary help service firm shall only be required to provide the assignment notification statement to the temporary laborer on the first day of the assignment and on any day that any of the terms listed on the assignment notification statement are changed.

(e) The assignment notification statement at (a) above shall contain the following:

1. The name of the temporary laborer;

2. The name, address, and telephone number of the following:

i. The temporary help service firm, or the firm's agent facilitating the placement;

ii. The temporary help service firm's workers' compensation carrier;

iii. The worksite employer or third-party client; and

iv. The Department of Labor and Workforce Development;

3. The name and nature of the work to be performed by the temporary laborer;

4. The wages offered to the temporary laborer;

5. The name and address of the assigned worksite of the temporary laborer;

6. The terms of transportation offered to the temporary laborer, if applicable;

7. A description of the position offered to the temporary laborer;

8. Whether the position offered to the temporary laborer will require any special clothing.

i. If the position offered to the temporary laborer will require any special clothing, a description of the special clothing required; and

ii. If the position offered to the temporary laborer will require any special clothing, whether it will be provided by the temporary help service firm at no cost to the temporary laborer; by the third-party client at no cost to the temporary laborer; or by the temporary laborer, and if by the temporary laborer, at what approximate cost to the temporary laborer;

9. Whether the position offered to the temporary laborer will require any protective equipment.

i. If the position offered to the temporary laborer will require any protective equipment, a description of the protective equipment is required; and

ii. If the position offered to the temporary laborer will require any protective equipment, whether it will be provided by the temporary help service firm at no cost to the temporary laborer; by the third-party client at no cost to the laborer; or by the temporary laborer, and if by the temporary laborer, at what approximate cost to the temporary laborer;

10. Whether the position offered to the temporary laborer will require any training.

i. If the position offered to the temporary laborer will require any training, a description of the training is required; and

ii. If the position offered to the temporary laborer will require any training, whether it will be provided by the temporary help service firm at no cost to the temporary laborer; by the third-party client at no cost to the laborer; or by the temporary laborer, and if by the temporary laborer, at what approximate cost to the temporary laborer;

11. Whether the position offered to the temporary laborer will require any supplies.

i. If the position offered to the temporary laborer will require any supplies, a description of the supplies required; and

ii. If the position offered to the temporary laborer will require any supplies, whether they will be provided by the temporary help service firm at no cost to the temporary laborer; by the third-party client at no cost to the laborer; or by the temporary laborer, and if by the temporary laborer, at what approximate cost to the temporary laborer;

12. Whether any meal(s) will be provided to the temporary laborer by the temporary help service firm or the third-party client; and, if yes, list the cost to the temporary laborer, if any;

13. Whether equipment (other than protective equipment) will be provided to the temporary laborer by the temporary help service firm or the third-party client; and, if yes, list the cost to the temporary laborer, if any;

14. Whether the position offered to the temporary laborer will require any license(s).

i. If the position offered to the temporary laborer does require any license(s), a description of the license(s) required; and

ii. For the purpose of this paragraph, the term "license" shall include any license or certification needed to perform any occupation or occupational activity;

15. Terms of the transportation offered to the temporary laborer, if applicable;

16. For muti-day assignments, the schedule;

17. The length of the assignment, if known; and

18. The amount of sick leave to which temporary laborers are entitled under the New Jersey Earned Sick Leave Law, N.J.S.A. 34:11D-1 et seq., and the terms of its use.

12:72-3.2 Notice of change on multi-day assignment

(a) For a multi-day assignment, when there is a change in the schedule, shift, or location, the temporary help service firm shall, when possible, provide notice 48 hours in advance of the change to the temporary laborer in a manner appropriate to whether the assignment was accepted at the temporary help service firm's office, or remotely by telephone, text, email, or other electronic exchange.

1. Where the assignment is accepted remotely by text, email, or other electronic exchange, the temporary help service firm shall provide the temporary laborer with notice of the change in schedule, shift, or location (and obtain acknowledgment of receipt of the notice of change if the temporary help service firm intends to do so) by text, email, or other electronic exchange, and may not require the temporary laborer to travel to the office of the temporary help service firm solely to receive notice of the change or acknowledge receipt of the notice of change.

2. Where the assignment is accepted by telephone or in-person at the office of the temporary help service firm, the temporary help service firm shall at the time of dispatch provide the temporary laborer the option of receiving notices of change in schedule, shift, or location (and acknowledging receipt of notices of change if the temporary help service firm intends to do so) either by:

i. Telephone;

ii. Text, email, or other electronic exchange; or

iii. Traveling to the office of the temporary help service firm.

(b) The temporary help service firm shall bear the burden of showing that it was not possible to provide the required notice.

(c) In the event that the Commissioner imposes an administrative penalty against a temporary help service firm pursuant to N.J.A.C. 12:72-1.2 for failure to provide the notice of change required pursuant to this section and the temporary help service firm requests a hearing pursuant to N.J.A.C. 12:72-1.3 to challenge the administrative penalty, any dispute concerning whether it was possible for the temporary help service firm to provide the notice of change required pursuant to this section shall be adjudicated during that hearing.

12:72-3.3 Notice of labor dispute

(a) No temporary help service firm shall send any temporary laborer to any designated classification placement where a strike, lockout, or other labor dispute exists without providing, at the time of dispatch, a statement, in writing, informing the temporary laborer of the labor dispute, and the temporary laborer's right to refuse the assignment.

(b) The requirement at (a) above shall apply only where the strike, lockout, or other labor dispute is occurring at the factory, establishment, or other premises to which the temporary laborer is being assigned by the temporary help service firm.

12:72-3.4 Confirmation of having sought work

(a) On any day that a temporary laborer who is employed by the temporary help service firm is not placed with a third-party client or otherwise contracted to work, the temporary help service firm shall provide to the temporary laborer, upon the temporary laborer's request, written confirmation that the temporary laborer sought work on that day.

(b) The written confirmation provided pursuant to (a) above shall be signed by an employee of the temporary help service firm, shall indicate the date and time that the written confirmation was received by the temporary laborer, and shall include the name of the temporary help service firm, and the name and address of the temporary laborer.

12:72-3.5 Translation of notices into languages other than English

(a) It shall be the responsibility of the temporary help service firm to make the assignment notification statement required pursuant to N.J.A.C. 12:72-3.1, the notices required pursuant to N.J.A.C. 12:72-3.2 and 3.3, and the written confirmation required pursuant to N.J.A.C. 12:72-3.4, available to temporary laborers in Spanish or in any other language that is generally understood in the locale of the temporary help service firm.

1. For the purpose of this section, the phrase "any other language that is generally understood in the locale of the temporary help service firm" means the language identified by the employee as the employee's primary language.

(b) The temporary help service firm may meet the requirement at (a) above either through its own employees or through the services of a vendor.

(c) Whether the Department makes the assignment notification statement required pursuant to N.J.A.C. 12:72-3.1, either of the notices required at N.J.A.C. 12:72-3.2 and 3.3, or the written confirmation required pursuant to N.J.A.C. 12:72-3.4, available to temporary help service firms in Spanish and/or other languages, this does not relieve the temporary help service firm of its responsibility pursuant to (a) above (and N.J.S.A. 34:8D-2(c)) to make the notices available to temporary laborers in Spanish and in any other language that is generally understood in the locale of the temporary help service firm.

SUBCHAPTER 4. RECORDKEEPING

12:72-4.1 Recordkeeping obligations; temporary help service firm

(a) A temporary help service firm shall keep the following records with regard to each assignment of a temporary laborer to work in a designated classification placement:

1. The name and address of the temporary laborer;

2. The name, address, and telephone number of the third-party client;

3. The date on which the temporary help service firm contracted with the third-party client for the services of the temporary laborer;

4. The name, address, and telephone number of each worksite to which the temporary laborer was sent by the temporary help service firm, and the date that the temporary laborer was sent to each worksite;

5. The name and nature of the work that was performed by the temporary laborer;

6. The number of hours that were worked by the temporary laborer;

7. The number of hours billed by the temporary help service firm to the third-party client for the temporary laborer's hours of work;

8. The temporary laborer's hourly rate of pay;

9. The name and title of the individual(s) at the third-party client who are responsible for the temporary laborer's assignment;

10. Any specific qualifications or attributes of a temporary laborer that were requested by the third-party client for the assignment;

11. Copies of the contract(s) with the third-party client for the assignment;

12. Copies of any invoice(s) provided by the temporary help service firm to the third-party client for payment in relation to the assignment;

13. Copies of the statements, notices, and written confirmations, provided by the temporary help service firm to the temporary laborer pursuant to N.J.A.C. 12:72-3.1 through 3.4;

14. A record of any deductions made from the temporary laborer's wages, including a description of each deduction and the amount of each deduction; and

15. Verification of the actual cost to the temporary help service firm or third-party client of any equipment or meal charged to the temporary laborer.

(b) The temporary help service firm shall obtain, and keep on file, documentation that any provider of transportation to a temporary laborer that the temporary help service firm makes referrals to or contracts with is in compliance with the requirements at N.J.S.A. 34:8D-5(e), (f) ,and (g).

(c) Each record listed at (a) and (b) above shall be maintained by the temporary help service firm for a period of six years from the date of the record's creation.

12:72-4.2 Recordkeeping and record remitting obligations; third-party client

(a) A third-party client shall keep the following records with regard to each temporary laborer assigned by a temporary help service firm to work in a designated classification placement for the third-party client:

1. The name, address, and telephone number of each worksite to which the temporary laborer was sent by the temporary help service firm, and the date that the temporary laborer was sent to each worksite;

2. The name and nature of the work that was performed by the temporary laborer;

3. The number of hours that were worked by the temporary laborer; and

4. The temporary laborer's hourly rate of pay.

(b) For each work week in which the temporary laborer performed work with the third-party client, the third-party client shall remit the records listed at (a) above to the temporary help service firm no later than seven business days after the last day of the work week.

1. For the purpose of this subsection, unless expressly set forth otherwise in an agreement between the temporary help service firm and the third-party client, the last day of each work week is the Sunday of that calendar week.

12:72-4.3 Inspection

(a) All records maintained by the temporary help service firm pursuant to N.J.A.C. 12:72-4.1 shall be open to inspection by the Commissioner during normal business hours.

(b) All records listed at N.J.A.C. 12:72-4.1(a), with the exception of the records listed at N.J.A.C. 12:72-4.1(a)10, 11, and 12, shall be made available by the temporary help service firm during normal business hours for copying by the temporary laborer or by an authorized representative of the temporary laborer at no cost to the temporary laborer or to the temporary laborer's authorized representative.

1. As a condition to obtaining access to and/or copying records pursuant to this subsection, the temporary laborer or the authorized representative of the temporary laborer may be required to submit a written request to the temporary help service firm.

2. Upon receipt of the written request for access and/or copying pursuant to (b)1 above, the temporary help service firm shall provide the temporary laborer or the authorized representative of the temporary laborer access to and the facilities to copy the requested records within five business days.

3. As a condition to an authorized representative of the temporary laborer obtaining access to and/or copying records pursuant to this subsection, the authorized representative must submit with the request a written authorization, signed by the temporary laborer, that expressly permits the authorized representative to review and copy the subject records.

4. The temporary help service firm shall make available to temporary laborers and their authorized representatives at the office of the temporary help service firm forms for use by temporary laborers and their authorized representatives in submitting requests to access and/or copy records pursuant to (b) above.

(c) The temporary help service firm shall not make any false, inaccurate, or incomplete entry into, or delete, any required information from any record required to be kept by the temporary help service firm pursuant to N.J.A.C. 12:72-4.1.

SUBCHAPTER 5. TRANSPORTATION

12:72-5.1 Requiring use prohibited

A temporary help service firm shall not require a temporary laborer to use transportation provided by the temporary help service firm or by another provider of transportation services.

12:72-5.2 Charging a fee prohibited

A temporary help service firm or a third-party client, or a contractor or agent of either, shall not charge a fee to a temporary laborer to transport the temporary laborer to or from the worksite.

12:72-5.3 Referrals

(a) A temporary help service firm shall not refer a temporary laborer to any person for transportation to or from a worksite, unless that person is either:

1. A public mass transportation system; or

2. Providing the transportation at no fee to the temporary laborer.

(b) For the purpose of this section, the following shall be considered a referral by the temporary help service firm:

1. Directing a temporary laborer to accept a specific carpool as a condition of work; or

2. Any mention or discussion of the cost of a carpool.

(c) For the purpose of this section, the following shall not be considered a referral by the temporary help service firm:

1. Informing a temporary laborer of the availability of a carpool driven by another temporary laborer.

12:72-5.4 Motor vehicle safety

(a) If a temporary help service firm provides transportation to a temporary laborer or refers a temporary laborer to any person for transportation to a worksite, the temporary help service firm shall not allow a motor vehicle to be used for the transporting of the temporary laborer if the temporary help service firm knows or should know that the motor vehicle used for the transportation of the temporary laborer is unsafe, or if any of the following circumstances exist:

1. The motor vehicle is not insured in accordance with the minimum insurance requirements set by the State of New Jersey;

2. The driver of the motor vehicle does not hold a valid license to operate motor vehicles in the correct classification; or

3. The motor vehicle does not have a seat and safety belt for each passenger.

(b) If the Department becomes aware of any of the circumstances set forth at (a)1, 2, or 3 above, with regard to a motor vehicle that is owned or operated by a temporary help service firm that makes designated classification placements or a third-party client of such a firm, or a contractor or agent of either, or a person to which a temporary help service firm refers a temporary laborer, which is used for the transportation of temporary laborers, it shall, in addition to or as an alternative to the assessment of a penalty against the temporary help service firm pursuant to N.J.A.C. 12:72-1.3(d), refer the matter to the appropriate law enforcement authority or regulatory agency.

12:72-5.5 Transportation back to point of hire

(a) Unless the temporary laborer requests otherwise, when a temporary laborer has been transported to a worksite, the temporary help service firm or a third-party client, or a contractor or agent of either, shall provide transportation back to the point of hire at the end of each workday.

1. For the purpose of this section, the term "point of hire" shall mean the location from which the temporary laborer was dispatched to perform work for the third-party client.

SUBCHAPTER 6. POST EMPLOYMENT RESTRICTIONS

12:72-6.1 Post employment restriction prohibited

(a) A temporary help service firm shall be prohibited from placing any restriction on a temporary laborer from either, accepting a permanent position with a third-party client to which the temporary help service firm has assigned the temporary laborer to perform work, or accepting any other permanent employment.

(b) A temporary help service firm shall be prohibited from placing any restriction on a third-party client from offering employment to a temporary laborer, except that the temporary help service firm may charge the third-party client a placement fee as set forth at N.J.A.C. 12:72-6.2.

12:72-6.2 Placement fee

(a) A temporary help service firm may charge a placement fee to a third-party client when the third-party client employs a temporary laborer who had been assigned by the temporary help service firm to perform work for the third-party client.

(b) The placement fee at (a) above shall not exceed the equivalent of the total daily commission rate that the temporary help service firm would have received over a 60-day period, reduced by the equivalent of the daily commission rate that the temporary help service firm would have received for each day the temporary laborer would have performed work for the temporary help service firm in the preceding 12 months.

(c) The following method shall be used to determine the maximum placement fee that may be charged by a temporary help service firm to a third-party client relative to the services of a given temporary laborer:

1. First, calculate the daily commission rate by subtracting the daily wages paid by the temporary help service firm to the temporary laborer for work performed on assignment to the third-party client and the daily cost to the temporary help service firm of benefits provided to the temporary laborer during the period of the temporary laborer's assignment with the third-party client, from the total daily amount paid by the third-party client to the temporary help service firm for the services of the temporary laborer;

2. Second, multiply the amount arrived at pursuant to (c)1 above by 43 (8.6 work weeks, multiplied by five workdays per week, for a total of 43 workdays), to arrive at the "equivalent of the total daily commission rate that the temporary help service firm would have received over a 60-day period";

3. Third, multiply the amount arrived at pursuant to (c)1 above by the number of days that the temporary laborer performed work for third-party clients of the temporary help service firm during the 12-month period immediately preceding the date upon which the temporary laborer accepted an offer of employment by the third-party client; and

4. Fourth, subtract the amount arrived at pursuant to (c)3 above from the amount arrived at pursuant to (c)2 above.

(d) If the amount arrived at pursuant to (c)4 above is a positive number, then that is the maximum placement fee that may be charged by the temporary help service firm to the third-party client. If the amount arrived at pursuant to (c)4 above is either zero or a negative number, then the maximum placement fee that may be charged by the temporary help service firm to the third-party client is zero.

(e) A temporary help service firm shall be prohibited from collecting a placement fee during any period of suspension, revocation, or non-renewal of its certification to make designated classification placements by the Director of the Division of Consumer Affairs.

SUBCHAPTER 7. PAY EQUITY

12:72-7.1 Temporary laborer pay equity requirement

Any temporary laborer assigned to work at a third-party client in a designated classification placement shall not be paid less than the average rate of pay and average cost of benefits, or the cash equivalent thereof, of employees of the third-party client performing the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions for the third-party client at the time the temporary laborer is assigned to work at the third-party client.

12:72-7.2 Calculation of the ***minimum*** hourly rate of pay that the temporary help service firm must pay the temporary laborer based on the average rate of pay and average cost of benefits of comparator employees of the third-party client

(a) At the time that the temporary help service firm contracts with the third-party client for the services of the temporary laborer, the third-party client shall provide to the temporary help service firm a listing of the hourly rate of pay and cost per hour of benefits for each employee of the third-party client who the third-party client determines would be a comparator employee.

(b) The temporary help service firm shall base its calculation of the average rate of pay and average cost of benefits for comparator employees of the third-party client, for the purpose of determining the temporary laborer's hourly rate of pay, on the information that it receives from the third-party client pursuant to (a) above.

(c) Where the third-party client pays a comparator employee on a salary basis, the hourly rate of pay for the comparator employee shall be calculated by dividing the annual salary paid to the comparator employee by 2,080 hours.

(d) To calculate the cost per hour of benefits, the annual cost to the employer of benefits shall be divided by 2,080 hours.

(e) In order for the temporary help service firm to determine pursuant to this section the appropriate ***minimum*** hourly rate of pay for the temporary laborer on a designated classification placement, the temporary help service firm shall use the following method:

1. Take the sum of the hourly rates of pay of the comparator employees identified by the third-party client and divide it by the number of comparator employees to arrive at the average hourly rate of pay of the third-party client's comparator employees;

2. Take the sum of the cost per hour of benefits of the comparator employees identified by the third-party client and divide it by the number of comparator employees to arrive at the average cost per hour of benefits of the third-party client's comparator employees;

3. Subtract the cost per hour of benefits provided by the temporary help service firm to the temporary laborer, from the sum of the average hourly rate of pay of the third-party client's comparator employees and the average cost per hour of benefits of the third-party client's comparator employees; and

4. The amount at (e)3 above is the ***minimum*** hourly rate of pay that the temporary help service firm shall pay the temporary laborer for all work performed on the designated classification placement.

(f) Under no circumstances should the calculation of the rate that the temporary help service firm must pay the temporary laborer pursuant to N.J.S.A. 34:8D-7.b or this subchapter ever result in the temporary laborer earning less than the minimum hourly wage rate required pursuant to N.J.S.A. 34:11-56a4 and N.J.A.C. 12:56.

12:72-7.3 Determining whether a temporary laborer and third-party client employee are performing substantially similar work

(a) The following principles should be applied when determining whether a temporary laborer and an employee of the third-party client are performing substantially similar work:

1. Substantially similar work should be viewed as a composite of skill, effort, and responsibility performed under similar working conditions;

2. Functions and duties need not be identical in order to be substantially similar;

3. Occasional, trivial, or minor differences in duties that only consume a minimal amount of the employee's time will not render the work dissimilar;

4. Job titles and job descriptions are relevant, but not dispositive, of whether two individuals are performing substantially similar work;

5. The determination should focus on an analysis of the actual job duties performed, not the specific person performing the work;

6. The analysis should be applied to a full work cycle, not just a snap shot of a particular time period or day;

7. Skill is measured by factors such as the experience, ability, education, and training required to perform a job;

8. Effort is the amount of physical or mental exertion needed to perform a job;

9. Responsibility is the degree of accountability and discretion required to perform a job;

10. The number of years of service (that is, seniority) of a particular employee is not relevant to the determination of whether two jobs are substantially similar, even where the third-party client's employee compensation system is seniority based; but rather, what is relevant is the number of years of experience that are required to perform a job.

i. For example, if the job to which the temporary laborer is being assigned with the third-party client requires five years of relevant experience and the job being performed by the prospective comparator employee of the third-party client requires five years of the same experience, this would be a factor mitigating in favor of a finding that the two jobs are substantially similar, notwithstanding that the comparator employee of the third-party client has worked for the third-party client for more than five years;

11. The third-party client's use of a merit system for the compensation of its employees is not relevant to the determination of whether two jobs are substantially similar; and

12. Working conditions, for the purpose of determining whether two jobs are being performed under similar working conditions, means the physical surroundings and hazards, but does not include job shifts.

SUBCHAPTER 8. CHARGES; PAYROLL DEDUCTIONS

12:72-8.1 Unreturned reusable equipment

A temporary help service firm may deduct from the wages of a temporary laborer the actual market value of unreturned reusable equipment that was provided to the temporary laborer by the temporary help service firm; provided that the temporary laborer authorizes the deduction, in writing, at the time the deduction is made.

12:72-8.2 Additional equipment, clothing, accessories, or other items that are not required by the nature of the work, that are made available for purchase

When a temporary help service firm makes available for purchase by a temporary laborer any equipment, clothing, accessories, or other items that are not required by the nature of the work, either by law, custom, or as a requirement of the third-party client, the temporary help service firm shall charge no more than the actual market value.

12:72-8.3 Meals

(a) A temporary help service firm shall not charge a temporary laborer for a meal not consumed by the temporary laborer and, if consumed, shall charge no more than the actual cost of the meal.

(b) A temporary help service firm shall not condition the employment of a temporary laborer on the purchase of a meal.

12:72-8.4 Consumer report, criminal background check, or drug test

No temporary help service firm or third-party client shall charge a temporary laborer for the expense of conducting a consumer report, as that term is defined in the Fair Credit Reporting Act (15 U.S.C. §§ 1681 et seq.), a criminal background check, or a drug test.

SUBCHAPTER 9. OTHER TEMPORARY HELP SERVICE FIRM RESPONSIBILITIES, THIRD-PARTY CLIENT RESPONSIBILITIES, AND TEMPORARY LABORER PROTECTIONS

12:72-9.1 Detailed itemized statement

(a) At the time the temporary help service firm pays the temporary laborer their wages, the temporary help service firm shall provide the temporary laborer with a detailed itemized statement, either on the temporary laborer's paycheck stub, or using the form made available at that time on the Department's website at https://www.nj.gov/labor/wageandhour/, listing the following:

1. The name, address, and telephone number of each third-party client at which the temporary laborer worked during that pay period.

i. If the information in this paragraph is provided on the temporary laborer's paycheck stub, the temporary help service firm may use a code for each third-party client, so long as the temporary help service firm also makes available to each temporary laborer at that time a key containing the name, address, and telephone number for each coded third-party client;

2. The number of hours worked by the temporary laborer at each third-party client on each day during that pay period.

i. If the temporary laborer is assigned to work at the same worksite of the same third-party client for multiple days in the same work week, the temporary help service firm may provide the temporary laborer with the total hours worked at the third-party client's worksite during the pay period (as opposed to a daily accounting), so long as the first and last day of that work are identified;

3. The rate of pay for each hour worked by the temporary laborer during that pay period, including any premium rate or bonus;

4. The total pay period earnings;

5. The total amount of each deduction made from the temporary laborer's wages made by the temporary help service firm, and the purpose for which each deduction was made, including for the temporary laborer's food, equipment, withheld income tax, withheld Social Security deductions, withheld contributions to the State Unemployment Compensation Trust Fund, and the State Disability Benefits Trust Fund, and every other deduction;

6. The current maximum amount of a placement fee pursuant to N.J.A.C. 12:72-6.2(c), which the temporary help service firm may charge to the third-party client to directly hire the temporary laborer;

7. The total amount charged by the temporary help service firm to the third-party client for the services of the temporary laborer during that pay period; and

8. Total cost to the temporary help service firm of benefits provided to the temporary laborer during that pay period.

12:72-9.2 Work verification; third-party client

(a) For the temporary laborer who is assigned to work a single day (as opposed to a multi-day assignment), the third-party client shall, at the end of the work day, provide the temporary laborer with a work verification, using the form made available at that time on the Department's website at https://www.nj.gov/labor/wageandhour/.

(b) The work verification provided to the temporary laborer pursuant to (a) above shall contain the following:

1. The date;

2. The name of the temporary laborer;

3. The name and address of the work location; and

4. The start time, end time, and total hours worked on that day.

12:72-9.3 Annual earnings summary

(a) Within a reasonable time after the preceding calendar year, but in no case later than February 1 of the current calendar year, a temporary help service firm shall provide a temporary laborer with an annual earnings summary for the preceding calendar year.

(b) At the time the temporary help service firm pays the temporary laborer their wages, the temporary help service firm shall individually provide the temporary laborer with notice of the availability of the annual earnings summary.

1. As an alternative to the individual notice required pursuant to this subsection, the temporary help service firm may post notice of the availability of the annual earnings summary in a conspicuous place in the public reception area of the temporary help service firm.

12:72-9.4 Holding of daily wages in favor of bi-weekly payments

(a) At the request of a temporary laborer, a temporary help service firm shall hold the daily wages of the temporary laborer and provide the temporary laborer with bi-weekly payments.

(b) The bi-weekly payment pursuant to (a) above shall be made by the temporary help service firm in accordance with the Department's rule regarding time and mode of wage payments at N.J.A.C. 12:55-2.4.

(c) A temporary help service firm that makes daily wage payments shall provide written notification to all temporary laborers of the right to request bi-weekly payments, rather than daily payments.

(d) The notification required pursuant to (c) above may be provided by the temporary help service firm by conspicuously posting the notice at the location where the daily wages are received by the temporary laborers.

12:72-9.5 Time and mode of wage payments; check cashing fees prohibited

(a) With regard to all payment of wages by a temporary help service firm to a temporary laborer, the temporary help service firm shall adhere to the requirements at N.J.A.C. 12:55-2.4 for employers regarding time and mode of wage payments, which includes, but is not limited to, the following requirements:

1. When a wage payment occurs by check, it shall be a check drawn on a financial institution where suitable arrangements are made for the cashing of such checks by employees without difficulty and for the full amount for which they were drawn; and

2. When a fee is charged for the cashing of a payroll check at the banking institution on which the check is drawn, the employer shall bear the burden of the fee.

12:72-9.6 Wage rate

For work performed by a temporary laborer in the position described on the assignment notification statement that is provided to the temporary laborer by the temporary help service firm at the time of dispatch pursuant to N.J.A.C. 12:72-3.1, the temporary help service firm shall pay the temporary laborer no less than the "wages offered" that are also indicated on the assignment notification statement.

12:72-9.7 Non-utilization; change in worksite

(a) When a temporary help service firm has contracted with a third-party client for a temporary laborer to perform work at a worksite of the third-party client and the temporary laborer is not utilized (that is, the temporary laborer does not work), the temporary help service firm shall pay the temporary laborer a minimum of four hours of pay at the agreed upon rate of pay.

(b) When a temporary help service firm has contracted with a third-party client for a temporary laborer to perform work at a worksite of the third-party client, but then contracts with that third-party client or another third-party client for the temporary laborer to perform work at a different worksite during the same shift, the temporary help service firm shall, in addition to any amounts due for work performed by the temporary laborer at the new worksite, pay the temporary laborer a minimum of two hours of pay at the agreed upon rate of pay for the work that would have been performed at the original worksite.

SUBCHAPTER 10. THIRD-PARTY PAYMENTS TO TEMPORARY HELP SERVICE FIRM

12:72-10.1 Third-party client payments to temporary help service firm for wages and related payroll taxes

A third-party client is required to reimburse a temporary help service firm wages and related payroll taxes for services performed for the third-party client by a temporary laborer, according to payment terms outlined on invoices, service agreements, or stated terms provided by the temporary help service firm.

12:72-10.2 Complaints to the Commissioner

(a) A temporary help service firm may file a complaint with the Commissioner that a third-party client has violated N.J.A.C. 12:72-10.1.

(b) A complaint pursuant to (a) above shall be filed with the Division either, in writing, or through any online complaint process made available by the Division.

(c) When a complaint pursuant to (a) above has been filed by a temporary help service firm, the Division shall review the payroll and accounting records of the temporary help service firm and the third-party client for the period in which the violation is alleged to have occurred to determine if wages and payroll taxes were paid to the temporary help service firm and that the temporary laborer has been paid the wages owed.

(d) At the conclusion of an investigation pursuant to (c) above, the Division may issue a determination that a third-party client has failed to pay wages or payroll taxes to the temporary help service firm. A temporary help service may seek a remedy for the third-party client's failure to pay wages or payroll taxes to the temporary help service firm in a court of competent jurisdiction.

LAW AND PUBLIC SAFETY

(a)

DIVISION OF CONSUMER AFFAIRS
REGULATED BUSINESS SECTION
Temporary Help Service Firms that Make Designated Classification Placements
Adopted New Rules: N.J.A.C. 13:45B-12A

Proposed: August 21, 2023, at 55 N.J.R. 1814(a).
Adopted: April 23, 2024, by Cari Fais, Acting Director, Division of Consumer Affairs.
Filed: August 21, 2024, as R.2024 d.090, **without change**.

Authority: P.L. 2023, c. 10.

Effective Date: September 16, 2024.
Expiration Date: March 14, 2029.

Summary of Public Comments and Agency Responses:

The official comment period ended on October 20, 2023. To ensure compliance with the Administrative Procedure Act and the rules promulgated by the Office of Administrative Law, the comment period was extended to October 29, 2023. The Division of Consumer Affairs (Division) received comments from:

1. Bradley J. Bartolomeo, Partner, Lewis Brisbois Bisgaard & Smith LLP
2. Jenny Calvert, Senior Counsel, Randstad US
3. Cristina Inzerillo, Executive Assistant, PROMAN

1. COMMENT: One commenter asks whether the certification, reporting, and surety bond requirements of section 8 at P.L. 2023, c. 10, apply only to the temporary help service firm or to every secondary location where the temporary help service firm conducts its business in New Jersey.

RESPONSE: P.L. 2023, c. 10, commonly referred to as the Temporary Workers' Bill of Rights (TWBR), prohibits any person or entity that meets the definition of "temporary help service firm" and makes "designated classification placements," as those terms are defined in the TWBR, from making any designated classification placements in this State unless the person or entity is certified by the Director of the Division (Director) to do so. Section 8 of the TWBR lists the requirements that each applicant must meet to obtain such certification. In addition, section 8 of the TWBR requires the Director to "assess each temporary help service firm seeking certification a non-refundable certification fee ... and a non-refundable fee ... for each branch office or other location where the temporary help service firm regularly conducts its business ..." Pursuant to the TWBR, each temporary help service firm and each branch office or other location where the temporary help service firm regularly conducts its business in New Jersey must be certified by the Director by applying for certification on a form that will be provided by the Division, paying the requisite certification fee, and submitting the following, as required by section 8 of the TWBR:

1. Proof of an employer account number issued by the Department of Labor and Workforce Development for the payment of unemployment insurance contributions;

2. Proof of valid workers' compensation insurance in effect at the time of certification;

3. The number of temporary laborers previously in designated classification placements whom the temporary help service firm has placed in a permanent position with a third-party client in the preceding 12 months as well as the percentage those permanent placements represent of the total number of temporary laborers in designated classification placements contracted by the temporary help service firm during the same period;

4. Proof of a surety bond that complies with the requirements of subsection b. of section 8 of the TWBR; and

5. An executed copy of the principal executive officer certification required by subsection c. of section 8 of the TWBR.

2. COMMENT: One commenter asks whether a temporary help service firm's assignment of a management team on the premises of a third-party