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RULE PROPOSALS

**LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF UNEMPLOYMENT INSURANCE**

45 N.J.R. 19(a)

Proposed Amendments: *N.J.A.C. 12:17-2.1, 9.1, 9.2, 10.1, and 21.2*

Proposed Repeals: *N.J.A.C. 12:17-10.2 through 10.9*

[Click here to view Interested Persons Statement](#)

Claims Adjudication - Voluntarily Leaving Work and Misconduct

Authorized By: Harold J. Wirths, Commissioner, Department of Labor and Workforce Development.

Authority: *N.J.S.A. 43:21-7g*.

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

Proposal Number: PRN 2013-004.

A **public hearing** on the proposed amendments and repeals will be held on the following date at the following location:

Tuesday, January 29, 2013
10:00 A.M.
New Jersey Department of Labor and Workforce Development
John Fitch Plaza
13th Floor Auditorium
Trenton, New Jersey

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

Submit written comments by March 8, 2013 to:

David Fish, Regulatory Officer
Office of Legal and Regulatory Services
Department of Labor and Workforce Development

P.O. Box 110, 13th Floor
[page=20] Trenton, New Jersey 08625-0110
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The agency proposal follows:

Summary

The Department of Labor and Workforce Development (Department) is proposing amendments and repeals within N.J.A.C. 12:17-2, 9, 10, and 21 in order to implement P.L. 2010, c. 37, which in pertinent part amends *N.J.S.A. 43:21-1* et seq., the Unemployment Compensation Law, so as to (1) increase from four to eight the number of weeks that an individual must be reemployed and work in order to establish eligibility for unemployment compensation after he or she either voluntarily leaves work without good cause attributable to such work or has been discharged for gross misconduct connected with such work; (2) increase from six times to 10 times the individual's weekly benefit amount, the total an individual must earn in order to establish eligibility for unemployment compensation after he or she either voluntarily leaves work without good cause attributable to such work or has been discharged for gross misconduct connected with such work; (3) increase from six to eight the number of weeks that an individual is disqualified from receipt of unemployment compensation when he or she has been suspended or discharged for misconduct connected with the work; (4) create a new category of misconduct known as "severe misconduct"; and (5) establish that when an individual has been suspended or discharged for severe misconduct connected with the work, he or she is disqualified for unemployment compensation for the week in which he or she has been suspended or discharged for severe misconduct connected with the work, and for each week thereafter until the individual becomes reemployed and works four weeks in employment and has earned in employment at least six times the individual's weekly benefit rate.

Amendments and repeals within N.J.A.C. 12:17-2, 9, 10, and 21 were originally proposed by the Department on November 15, 2010, in order to implement P.L. 2010, c. 37. See *42 N.J.R. 2712(a)*. The Department did not adopt the November 2010 notice of proposal (November 2010 Proposal), nor did it file the adoption with the Office of Administrative Law (OAL) within one year from the November 15, 2010 publication of the notice of proposal in the New Jersey Register. Therefore, pursuant to *N.J.A.C. 1:30-6.2(c)*, the November 2010 Proposal expired. This notice of proposal is virtually identical to the November 2010 Proposal, except that, (1) this notice of proposal contains a requirement that employer proof of misconduct must be through written documentation; and (2) this notice of proposal would define "simple misconduct" in the same manner that existing *N.J.A.C. 12:17-10.2* defines "misconduct"; whereas the November 2010 Proposal sought to change the definition of "simple misconduct" (formerly known as "misconduct") for the reasons explained in the November 2010 proposal. Regarding employer proof of misconduct, written comments were received in response to the November 2010 Proposal that made reference to the Governor's Conditional Veto Statement to Senate Bill No. 1813, in which the Governor indicated that he would "advise the Department of Labor and Workforce Development to ... propose appropriate regulations to require that an employer provide written documentation to show that the employee's actions constitute either misconduct, severe misconduct, or gross misconduct." Although the above-cited excerpt from the Governor's Conditional Veto Statement has neither the force, nor the effect of law, and is, therefore, not binding, the Department is proposing amendments and repeals that include the written documentation requirement, at the instruction of the Governor's Office.

The proposed amendments to *N.J.A.C. 12:17-9.1* and *9.2* would simply substitute where appropriate eight weeks for four weeks and 10 weeks for six weeks.

The proposed amendments to *N.J.A.C. 12:17-2.1*, *10.1*, and *21.2* would (1) insert and define the term "severe misconduct," in a manner consistent with P.L. 2010, c. 37; (2) introduce the term "simple misconduct" in order to characterize those types of misconduct that are neither severe misconduct, nor gross misconduct; (3) define the term "simple misconduct" in a manner consistent with the definition of "misconduct," which appears in existing *N.J.A.C. 12:17-10.2*; (4) increase from six to eight the number of weeks that an individual is disqualified from receipt of unemployment compensation when he or she has been suspended or discharged for simple misconduct connected with the work (formerly known as "misconduct connected with the work"); (5) relative to the reemployment requirement for purposes of establishing unemployment compensation eligibility following a discharge due to gross misconduct connected with the work, substitute eight weeks in employment for four weeks in employment and substitute 10 times the individual's weekly benefit rate for six times the individual's weekly benefit rate; (6) relocate all misconduct-related definitions to *N.J.A.C. 12:17-2.1*, which contains definitions for words and terms used throughout the chapter; (7) where appropriate, substitute the term "misconduct" for the phrase "misconduct or gross misconduct"; and (8) relocate existing *N.J.A.C.*

12:17-10.2(b) to *N.J.A.C. 12:17-10.1(f)*, where the subsection pertaining to burden of proof in misconduct cases is better situated.

Finally, the Department is proposing the repeal of *N.J.A.C. 12:17-10.2* through *10.9*, which is necessitated by the relocation of all misconduct-related definitions to *N.J.A.C. 12:17-2.1* (repeal of *N.J.A.C. 12:17-10.2*) and the statutory creation of "severe misconduct" (repeal of *N.J.A.C. 12:17-10.3* through *10.9*). Specifically, regarding the latter, each of the sections proposed for repeal addresses a particular set of factual circumstances relative to "misconduct," as that term had been used prior to the passage of P.L. 2010, c. 37. For example, existing *N.J.A.C. 12:17-10.3* concerns when an individual has been discharged or suspended for unauthorized absence; existing *N.J.A.C. 12:17-10.4* concerns when an individual has been discharged or suspended for tardiness. With the advent of "severe misconduct," which includes, but is not limited to, such things as "repeated lateness or absences after a written warning by an employer," the explanations that appear within the sections proposed for repeal are obsolete. Again, it is for this reason that the Department is proposing the repeal of *N.J.A.C. 12:17-10.3* through *10.9*.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements, pursuant to *N.J.A.C. 1:30-3.3(a)5*.

Social Impact

The vast majority of the proposed amendments and repeals either mirror P.L. 2010, c. 37 or are necessitated by the new law. Therefore, whatever negative social impact might be felt by claimants would derive in the first instance from the law, P.L. 2010, c. 37, not the proposed amendments and repeals. As to the remainder of the amendments and repeals, it is the Department's belief that they would have a positive social impact in that they would minimize any possible confusion as to when and how a claimant for unemployment compensation is disqualified for benefits, pursuant to the Unemployment Compensation Law, *N.J.S.A. 43:21-1* et seq., and *N.J.A.C. 12:17-10*, when the individual has been suspended or discharged for misconduct connected with the work, which now includes simple misconduct, severe misconduct, and gross misconduct connected with the work.

Economic Impact

As indicated above, the vast majority of the proposed amendments and repeals either mirror P.L. 2010, c. 37 or are necessitated by the new law. Therefore, whatever negative economic impact might be felt by claimants would derive in the first instance from the law, P.L. 2010, c. 37, not the proposed amendments and repeals. As to the remainder of the amendments and repeals, it is the Department's belief that they would have a positive economic impact in that they would minimize any possible confusion as to when and how a claimant for unemployment compensation is disqualified for benefits, pursuant to the Unemployment Compensation Law, *N.J.S.A. 43:21-1* et seq., and *N.J.A.C. 12:17-10*, when the individual has been suspended or discharged for misconduct connected with the work, which now includes simple misconduct, severe misconduct, and gross misconduct connected with the work. It is the Department's hope that minimizing confusion as to these issues will avoid costs for claimants and employers of unnecessary litigation, which might otherwise result.

Federal Standards Statement

The proposed amendments and repeals do not exceed standards or requirements imposed by Federal law. Specifically, the proposed amendments and repeals are not inconsistent with the Federal [page=21] Unemployment Tax Act, *26 U.S.C. §§ 3301* et seq. Consequently, no Federal standards analysis is required.

Jobs Impact

The proposed amendments and repeals would have no impact on either the generation or loss of jobs.

Agriculture Industry Impact

The proposed amendments and repeals would have no impact on the agriculture industry.

Regulatory Flexibility Statement

The proposed amendments and repeals would impose no reporting, recordkeeping or compliance requirements on small businesses, as that term is defined by the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16* et seq. The purpose and effect of the proposed amendments and repeals is described in detail in the Summary above.

Housing Affordability Impact Analysis

The proposed amendments and repeal would not evoke a change in the average costs associated with housing. The basis for this finding is that the proposed amendments and repeal pertain to unemployment compensation, and have nothing whatsoever to do with housing.

Smart Growth Development Impact Analysis

The proposed amendments and repeals would not evoke a change in the housing production within Planning Areas 1 and 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed amendments and repeals pertain to unemployment compensation, and have nothing whatsoever to do with housing production.

Full text of the rules proposed for repeal may be found in the New Jersey Administrative Code at *N.J.A.C. 12:17-10.2* through *10.9*.

Full text of the proposed amendments follows (additions indicated with boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 2. DEFINITIONS

12:17-2.1 Definitions

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

...

"Connected with the work" means not only misconduct that occurs in the course of employment during working hours, but includes any conduct that occurs after working hours or off the employer's premises where there is substantial evidence that the conduct adversely impacts the employer or the individual's ability to perform the duties of his or her job.

...

"Gross misconduct" means an act punishable as a crime of the first, second, third, or fourth degree under the "New Jersey Code of Criminal Justice," *N.J.S.A. 2C:1-1* et seq.

...

"Misconduct" means simple misconduct, severe misconduct, and gross misconduct.

...

"Severe misconduct" means an act which is either expressly enumerated in the "include, but are not necessarily limited to" list within *N.J.A.C. 12:17-10.1(b)* or both malicious and deliberate, but not considered gross misconduct.

"Simple misconduct" means an act that is neither severe misconduct, nor gross misconduct, and which is improper, intentional, connected with one's work, malicious, and within the individual's control, and is either a deliberate violation of the employer's rules or a disregard of standards of behavior that the employer has the right to expect of an employee.

...

SUBCHAPTER 9. CLAIM ADJUDICATION--VOLUNTARILY LEAVING WORK

12:17-9.1 Disqualification for voluntarily leaving **work**--general principals

(a) An individual shall be disqualified for benefits for the week in which he or she has left work voluntarily without good cause attributable to such work, and for each week thereafter until the individual becomes reemployed and works [four] **eight** weeks in employment, which may include employment for the Federal government, and has earned in employment at least [six] **10** times the individual's weekly benefit rate, as determined in each case. See *N.J.S.A. 43:21-5(a)*.

(b)-(e) (No change.)

12:17-9.2 Voluntarily leaving secondary part-time employment

(a) A worker, who is employed by two or more employers, one of which is full-time work and the other(s) part-time work, who is separated from the full-time employment and becomes eligible for benefits, and subsequently voluntarily leaves the part-time employment, shall be subject to a partial disqualification for voluntarily leaving the part-time employment. An individual may avoid partial disqualification if he or she can establish good cause attributable to such work as defined in *N.J.A.C. 12:17-9.1(b)*. The partial disqualification amount is determined by dividing the total part-time earnings during the eight-week period immediately preceding the week in which the separation occurred by the total number of weeks the individual worked in that part-time employment during the eight-week period. The partial earnings amount is then deducted from the partial weekly benefit amount. The partial disqualification shall remain in effect until the individual becomes reemployed and works [four] **eight** weeks in employment, which may include employment for the Federal government, and he or she has earned in employment [six] **10** times the individual's weekly benefit rate, as determined in each case.

1.-2. (No change.)

(b) (No change.)

SUBCHAPTER 10. CLAIMS ADJUDICATION--MISCONDUCT [AND GROSS MISCONDUCT] CONNECTED WITH WORK

12:17-10.1 Disqualification for misconduct [and gross misconduct] connected with work, **including simple misconduct, severe misconduct, and gross misconduct**--general principles

(a) An individual shall be disqualified for benefits for the week in which the individual has been suspended or discharged for **simple** misconduct connected with the work, and for the [five] **seven** weeks which immediately follow that week. (See *N.J.S.A. 43:21-5(b)*.)

(b) An individual shall be disqualified for benefits for the week in which the individual has been suspended or discharged for severe misconduct connected with the work, and for each week thereafter until the individual becomes reemployed and works four weeks in employment, which may include employment for the Federal government, and has earned in employment at least six times the individual's weekly benefit rate, as determined in each case. Examples of severe misconduct include, but are not necessarily limited to, the following: repeated violations of an employer's rule or policy, repeated lateness or absences after a written warning by an employer, falsification of records, physical assault or threats that do not constitute gross misconduct as defined in *N.J.S.A. 43:21-5*, misuse of benefits, misuse of sick time, abuse of leave, theft of company property, excessive use of intoxicants or drugs on work premises, theft of time, or where the behavior is malicious and deliberate but is not considered gross misconduct as defined in *N.J.S.A. 43:21-5*.

[(b)] (c) (No change in text.)

[(c)] **(d)** If the individual's discharge was for gross misconduct connected with the work because he or she committed an act punishable as a crime of the first, second, third, or fourth degree under the "New Jersey Code of Criminal Justice," *N.J.S.A. 2C:1-1* et seq., the individual shall be disqualified for benefits for the week in which he or she was discharged and for each week thereafter until the individual becomes [page=22] reemployed and works [four] **eight** weeks in employment and has earned at least [six] **10** times the individual's weekly benefit rate. The individual will have no benefit rights based upon wages from that employer for services rendered prior to the day upon which he or she was discharged.

[(d)] **(e)** (No change in text.)

(f) To sustain disqualification under this section, the burden of proof is on the employer to show through written documentation that the employee's actions constitute misconduct. However, in the case of gross misconduct, the following apply:

1. Where an employer provides sufficient evidence to establish that a claimant was discharged for gross misconduct connected with the work, prosecution, or conviction shall not be required to sustain that the claimant has engaged in gross misconduct; and

2. If an individual has been convicted of a crime of the first, second, third, or fourth degree under the New Jersey Code of Criminal Justice, *N.J.S.A. 2C:1-1* et seq., in a court of competent jurisdiction, such conviction shall be conclusive as to a finding of gross misconduct.

SUBCHAPTER 21. RELIEF FROM BENEFIT CHARGES

12:17-21.2 Reasons for separation

(a) A base year employer may obtain relief from the charges for benefits paid to a former employee if the claimant was separated from his or her work with such employer due to any of the following reasons:

1. (No change.)

2. The claimant was discharged for willful misconduct [or gross misconduct] connected with the work;

3.-6. (No change.)