

[51 N.J.R. 1595\(a\)](#)

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RULE PROPOSALS

Reporter

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Interested Persons Statement

INTERESTED PERSONS

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

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

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

Agency

LABOR AND WORKFORCE DEVELOPMENT > DIVISION OF UNEMPLOYMENT INSURANCE

Administrative Code Citation

Proposed Amendments: [N.J.A.C. 12:17-2.1](#) and [10.1](#) through [10.8](#)

Text

Claims Adjudication--Misconduct

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

DAVID FISH

Authority: [N.J.S.A. 43:21-7g](#).

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

Proposal Number: PRN 2019-142.

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

Monday, December 2, 2019

10:00 A.M to 12:00 Noon

New Jersey Department of Labor and Workforce Development

John Fitch Plaza

11th Floor Large Conference Room

Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 777-2960 if you wish to be included on the list of speakers.

Submit written comments by January 3, 2020, to:

David Fish, Executive Director

Legal and Regulatory Services

Department of Labor and Workforce Development

PO Box 110, 13th Floor

Trenton, New Jersey 08625-0110

David.fish@dol.nj.gov

The agency proposal follows:

Summary

The Department of Labor and Workforce Development (Department) is proposing amendments to [N.J.A.C. 12:17-2.1](#) and [10.1](#) through [10.8](#) in order to implement P.L. 2018, c. 112, which amended the New Jersey Unemployment Compensation Law (UCL), [N.J.S.A. 43:21-1](#) et seq., specifically, [43:21-5](#), with regard to disqualification from unemployment compensation due to misconduct connected with the work. Following is a list of changes to the UCL resulting from P.L. 2018, c. 112:

(1) Decreased from eight to six, 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;

(2) Eliminated "severe misconduct connected with the work" as a separate category for disqualification from receipt of unemployment compensation;

(3) Inserted a new definition for "misconduct," namely, conduct that is improper, intentional, connected with the individual's work, within the individual's control, not a good faith error of judgment or discretion, and is either a deliberate refusal, without good cause, to comply with the employer's lawful and reasonable rules made known to the employee or a deliberate disregard of the standards of behavior the employer has a reasonable right to expect, including reasonable safety standards and reasonable standards for a workplace free of drug and substance abuse;

(4) Required that to sustain disqualification from benefits due to misconduct under [N.J.S.A. 43:21-5\(b\)](#), the burden of proof is upon the employer, who shall, prior to a determination by the Department of misconduct, provide written documentation demonstrating that the employee's actions constitute misconduct or gross misconduct; and

(5) Indicated that nothing within [N.J.S.A. 43:21-5\(b\)](#), regarding disqualification from benefits for misconduct connected with the work, shall be construed to interfere with the exercise of rights protected under the National Labor Relations Act, [29 U.S.C. §§ 151 et seq.](#), or the New Jersey Employer-Employee Relations Act, P.L. 1941, c. 100 ([N.J.S.A. 34:13A-1](#) et seq.).

To implement these changes, the Department proposes the following amendments at [N.J.A.C. 12:17](#):

(1) The Department is proposing to amend [N.J.A.C. 12:17-2.1](#) to: (a) delete the term "severe misconduct" and its corresponding definition; (b) delete the term "simple misconduct" and its corresponding definition; (c) delete the term "malicious" and its corresponding definition; and (d) add the new statutory definition for the term "misconduct";

(2) The Department is proposing to amend [N.J.A.C. 12:17-10.1](#) to reduce from eight to six, the number of weeks that an individual is disqualified from benefits for misconduct connected with the work; that is, following the proposed amendment, subsection (a) would read that an individual shall be disqualified for benefits for the week in which the individual has been suspended or discharged for misconduct connected with the work, and for the five weeks that immediately follow that week;

(3) The Department is proposing to amend [N.J.A.C. 12:17-10.1](#), so as to adopt verbatim the language used within [N.J.S.A. 43:21-5\(b\)](#), as amended by P.L. 2018, c. 112, regarding the burden of proof to sustain a disqualification for misconduct connected with the work. Specifically, following the proposed amendment, recodified subsection (e) would read: "To sustain disqualification under this section, the burden of proof is upon the employer, who shall, prior to a determination by the Department of misconduct, provide written documentation demonstrating that the employee's actions constitute misconduct or gross misconduct";

(4) The Department is proposing new [N.J.A.C. 12:17-10.1\(f\)](#), which would indicate that nothing within N.J.A.C. 12:17-10 shall be construed to interfere with the exercise of rights protected under the National Labor Relations Act, [29 U.S.C. §§ 151 et seq.](#), or the New Jersey Employer-[page=1596] Employee Relations Act, P.L. 1941, c. 100 ([N.J.S.A. 34:13A-1](#) et seq.); and

(5) Throughout N.J.A.C. 12:17-10, the Department is proposing to delete the term "simple misconduct" and replace it with the term "misconduct."

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 Department does not anticipate that the proposed amendments would have any negative social impact. To the contrary, it is the Department's belief that the proposed amendments 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 when the individual has been suspended or discharged for misconduct connected with the work. Furthermore, the proposed amendments, which implement P.L. 2018, c. 112, would have a positive social impact in that they would simplify the issue of disqualification for misconduct connected with the work by eliminating the unnecessary intermediate level of misconduct previously known as "severe misconduct," and by introducing a fair, equitable, and easy to understand definition for the term "misconduct."

Economic Impact

The proposed amendments 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 when the

individual has been suspended or discharged for 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. In addition, the proposed amendments would implement the Legislature's reduction of the disqualification period for misconduct connected with the work from eight weeks to six weeks. This would have a positive economic impact on claimants.

Federal Standards Statement

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

Jobs Impact

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

Agriculture Industry Impact

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

Regulatory Flexibility Analysis

The proposed amendments 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 is described in detail in the Summary above. Specifically, regarding the impact on businesses, including small businesses, of the proposed amendment to recodified [N.J.A.C. 12:17-10.1\(e\)](#), the existing rule already indicates that the burden of proof to sustain a disqualification for misconduct is on the employer to show through written documentation that the employee's actions constitute misconduct. P.L. 2018, c. 112, simply codifies that existing regulatory requirement within the UCL. The proposed regulatory amendment would adopt verbatim the new statutory language, so as to ensure consistency between the UCL and Department rules. For example, the existing rule states that the employer shall "show through written documentation that the employee's actions constitute misconduct," whereas the UCL, amended by P.L. 2018, c. 112, states that the employer shall "provide written documentation demonstrating that the employee's actions constitute misconduct." The proposed amendment would align the terminology used within the UCL, as amended, with the terminology used in [N.J.A.C. 12:17](#), but as to the burden on employers, the proposed amendments would result in no material change. Each amendment proposed by the Department is dictated by a corresponding amendment to [N.J.S.A. 43:21-5](#) resulting from P.L. 2018, c. 112. The Department has no discretion to deviate from the statute. Employers should not require outside professional services to comply with the proposed amendments.

Housing Affordability Impact Analysis

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

Smart Growth Development Impact Analysis

The proposed amendments 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 pertain to unemployment compensation and do not pertain to housing production, either within Planning Areas 1 or 2, within designated centers, or anywhere in the State of New Jersey.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

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

Full text of the proposal follows (additions indicated in 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.

...

["Malicious" means when an act is done with the intent to cause injury or harm to another or others or when an act is substantially certain to cause injury or harm to another or others.]

...

"Misconduct" means [simple misconduct, severe misconduct, or gross misconduct.] **conduct that is improper, intentional, connected with the individual's work, within the individual's control, not a good faith error of judgment or discretion, and is either a deliberate refusal, without good cause, to comply with the employer's lawful and reasonable rules made known to the employee or a deliberate disregard of the standards of behavior the employer has a reasonable right to expect, including reasonable safety standards and reasonable standards for a workplace free of drug and substance abuse.**

...

["Severe misconduct" means an act which (1) constitutes "simple misconduct," as that term is defined in this section; (2) is both deliberate and malicious; and (3) is not "gross misconduct."

1. Pursuant to [N.J.S.A. 43:21-5](#), as amended by P.L. 2010, c. 37, such acts of "severe misconduct" shall include, but not necessarily be 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," misuse of benefits, misuse of sick time, abuse of leave, theft of company property, excessive use of intoxicants or drugs on work premises, or theft of time; except that in order for any such act to constitute "severe misconduct," it must also (1) constitute "simple misconduct"; and (2) be both deliberate and malicious.

"Simple misconduct" means an act which is neither "severe misconduct" nor "gross misconduct" and which is an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior that the employer has the right to expect of his or her employee, or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer. Nothing [page=1597] contained within this definition should be construed to interfere with the exercise of rights protected under the National Labor Relations Act or the New Jersey Employer-Employee Relations Act.]

...

SUBCHAPTER 10. CLAIMS ADJUDICATION--MISCONDUCT CONNECTED WITH THE WORK

12:17-10.1 Disqualification for misconduct connected with the work--general principles

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(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 [seven] **five** weeks that 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.]

Recodify existing (c)-(e) as **(b)-(d)** (No change in text.)

[(f)] **(e)** To sustain disqualification under this section, the burden of proof is [on] **upon** the employer [to show through] , **who shall, prior to a determination by the Department of misconduct, provide** written documentation **demonstrating** that the employee's actions constitute misconduct **or gross misconduct**. However, in the case of gross misconduct, the following apply:

1.-2. (No change.)

(f) Nothing within this subchapter shall be construed to interfere with the exercise of rights protected under the National Labor Relations Act, [29 U.S.C. §§ 151 et seq.](#), or the New Jersey Employer-Employee Relations Act, P.L. 1941, c. 100 ([N.J.S.A. 34:13A-1 et seq.](#)).

12:17-10.2 Discharge or suspension for unauthorized absence

(a) An individual shall be disqualified for benefits for [simple] misconduct connected with the work, if he or she did not have good cause for being absent from work[,], or failed without justification to take steps necessary to notify the employer of the absence and the reason therefor.

(b)-(c) (No change.)

12:17-10.3 Discharge or suspension for tardiness

(a) Tardiness shall constitute [simple] misconduct if it was:

1.-2 (No change.)

12:17-10.4 Discharge or suspension for falsification of application or other records

An individual shall be considered to have committed an act of [simple] misconduct when it is established that he or she falsified an employment application or other records required by the employer, or omitted information which created a material misrepresentation of his or her qualifications or suitability for the job.

12:17-10.5 Discharge or suspension for insubordination or violation of an employer's rule

(a) An individual shall be considered to have been discharged for an act of [simple] misconduct where it is established that he or she has committed an act of "[simple] misconduct" and met one of the following:

1.-3. (No change.)

12:17-10.6 Discharge or suspension for unsatisfactory work performance

An individual's discharge for failure to meet the employer's standard(s) relating to **the** quantity or quality of work shall not be considered [simple] misconduct, unless it is established that he or she deliberately performed below the standard(s), in a manner that is consistent with "[simple] misconduct," and that the standard(s) was reasonable.

12:17-10.7 Discharge or suspension for failure to observe safety standards

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Where an individual has violated a reasonable safety standard imposed by the employer, such violation shall constitute an act of [simple] misconduct if the violation is consistent with the definition of "[simple] misconduct."

12:17-10.8 Failing or refusing to take an employer drug test

(a) Where a drug-free workplace and/or drug testing is a prerequisite of employment, an employee who tests positive for illegal drugs on a bona fide drug test of the employer or refuses to provide a test sample for the employer violates a condition of employment. If separated from employment for this reason, the employee shall be disqualified for benefits for [simple] misconduct connected with such work.

(b) (No change.)

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