

# 53 N.J.R. 766(a)

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## RULE PROPOSALS

### Reporter

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***NJ - New Jersey Register > 2021 > MAY > MAY 17, 2021 > RULE PROPOSALS > LABOR AND WORKFORCE DEVELOPMENT -- OFFICE OF THE COMMISSIONER***

## Interested Persons Statement

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### 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

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LABOR AND WORKFORCE DEVELOPMENT > OFFICE OF THE COMMISSIONER

## Administrative Code Citation

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Proposed New Rules: N.J.A.C. 12:8

## Text

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**Listing of Persons Prohibited from Contracting with Any Public Body Due to a Violation of State Wage, Benefit, or Tax Laws**

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

Authority: N.J.S.A. 34:1-20 and 34A:1-1.16.

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

Proposal Number: PRN 2021-048.

Submit written comments by July 16, 2021, to:

David Fish, Executive Director  
Legal and Regulatory Services  
New Jersey Department of Labor and Workforce Development  
PO Box 110-13th Floor  
Trenton, New Jersey 08625-0110  
Fax to: (609) 292-8246  
Email: david.fish@dol.nj.gov

The agency proposal follows:

**Summary**

The Department of Labor and Workforce Development (Department) is proposing new rules at N.J.A.C. 12:8, in order to implement N.J.S.A. 34:1A-1.16 (the Act), which became effective January 20, 2020, and which empowers the Commissioner of the Department (Commissioner), under certain circumstances, to post a list, on the Department's website, of persons prohibited from contracting with any public body, the name of a person found to be in violation of any State wage, benefit, or tax laws, and against whom a final order has been issued by the Commissioner or other appropriate agency officer for any violation of a State wage, benefit, or tax law.

Proposed new N.J.A.C. 12:8-1.1 would set forth the purpose and scope of the chapter.

Proposed new N.J.A.C. 12:8-2.1 would include definitions of words and terms used throughout the chapter.

Proposed new N.J.A.C. 12:8-3.1 would address the actual posting of names to a list on the Department's website of persons prohibited from contracting with a public body due to a violation(s) of State wage, benefit, or tax laws, including criteria to be applied by the Department when determining whether to post a name to the list; the procedure for providing notice of intent to post a name to the list; the procedure for curing a violation, so as either to avoid the posting of a name to the list prior to the actual posting, or to have a name removed from the list after it has already been posted; and, finally, appeal rights for those who wish to challenge the posting of their name to the list.

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

**Social Impact**

The vast majority of the proposed new rules either mirror the Act or are necessitated by the Act. Regarding the social impact of the Act, the Statement to Senate Committee Substitute for S2773 (which became N.J.S.A. 34:1A-1.11 et seq.), a companion bill to S4226 (which became N.J.S.A. 34:1A-1.16), is instructive. The Statement to S2773 explains that among the purposes of N.J.S.A. 34:1A-1.11 et seq., is to impose sanctions; specifically, suspension or revocation of certain employer licenses on employers who violate State wage, tax, or benefit laws and who thereby "gain unfair competitive advantage by employing workers 'off the books,' thus choosing to ignore

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recordkeeping requirements and evade the payment of legally-required wages, benefits and taxes." Similarly, N.J.S.A. 34:1A-1.16 imposes a sanction against employers who have [page=767] violated State wage, benefit, or tax laws; specifically, posting an employer's name to a list of those prohibited from contracting with a public body. Since these two laws are two parts of one overall legislative scheme aimed at addressing violations of State wage, benefit, and tax laws, it is safe to assume that they serve the same policy objective, as described above. Furthermore, it is the Department's belief that the proposed new rules would have a positive social impact in that they would minimize any possible confusion as to who is covered by, and what acts are prohibited under, the Act. Finally, the proposed new rules would have a positive social impact in that they would establish a regulatory framework for inclusion, pursuant to the Act, of a person's name, on the Department's list of persons prohibited from contracting with any public body and for the processing of appeals under the Act.

### **Economic Impact**

As indicated in the Social Impact statement, most of the proposed new rules either mirror or are necessitated by the Act. The posting of a person's name to a list of those prohibited from contracting with any public body is likely to have a negative impact on those persons who, due to their own illegal actions, find themselves included on the Department's list. However, those proposed new rules that provide mechanisms for a person to avoid placement of his or her name on the list, to have his or her name removed from the list, and to appeal the posting of his or her name to the list, should minimize the negative economic impact described above. It is also the Department's hope that the proposed new rules would have a positive economic impact in that they would minimize any possible confusion as to who is covered by, and what acts are prohibited under, the Act, which should avoid costs for those impacted by the Act of unnecessary litigation, which might otherwise result.

### **Federal Standards Statement**

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

### **Jobs Impact**

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

### **Agriculture Industry Impact**

The proposed new rules would impact the agriculture industry in precisely the same way that they would impact any other industry; which is to say, covered agriculture industry employers would be required to comply with the Act and the proposed new rules, as would any other covered person. Neither the Act, nor the proposed new rules, differentiate among covered persons based on industry type.

### **Regulatory Flexibility Analysis**

The proposed new rules would reflect a uniform application of the Act, as dictated by the Act itself, to all covered persons, including those that are small businesses, as that term is defined within the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. That is, under the Act, any employer, large or small, who has been found to be in violation of any State wage, benefit, or tax laws and against whom a final order has been issued by the Commissioner or other appropriate agency officer for any violation of a State wage, benefit, or tax law, may under certain circumstances be included on a list of persons prohibited from contracting with any public body. The Department has no discretion to deviate from this statutory mandate.

### **Housing Affordability Impact Analysis**

The proposed new rules would not evoke a change in the average costs associated with housing or with the affordability of housing because the proposed new rules pertain to the obligations of employers under State wage, benefit, and tax laws. The proposed new rules do not pertain to housing.

### Smart Growth Development Impact Analysis

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

### Racial and Ethnic Community Criminal Justice and Public Safety Impact

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

**Full text** of the proposed new rules follows:

#### CHAPTER 8

#### LISTING OF PERSONS PROHIBITED FROM CONTRACTING WITH ANY PUBLIC BODY DUE TO A VIOLATION OF STATE WAGE, BENEFIT, OR TAX LAWS

##### SUBCHAPTER 1. GENERAL PROVISIONS

###### 12:8-1.1 Purpose and scope

(a) The purpose of this chapter is to implement N.J.S.A. 34:1A-1.16, which empowers the Commissioner, under certain circumstances, to post to a list of persons prohibited from contracting with any public body on the Department of Labor and Workforce Development's website, the name of a person found to be in violation of any State wage, benefit, or tax laws and against whom a final order has been issued by the Commissioner, or other appropriate agency officer, for any violation of a State wage, benefit, or tax law.

(b) This chapter applies to each person covered under any one or all of the State wage, benefit, or tax laws.

##### SUBCHAPTER 2. DEFINITIONS

###### 12:8-2.1 Definitions

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

"Commissioner" means the Commissioner of the Department of Labor and Workforce Development, or the Commissioner's duly authorized representative.

"Contracting" means any arrangement giving rise to an obligation to supply any product, or to perform any service, for a public body, other than by virtue of State employment, or to supply any product, or to perform any service, for a private person where the State provides substantial financial assistance and retains the right to approve or disapprove the nature or quality of the goods or services or the persons who may supply or perform the same.

"Department" means the Department of Labor and Workforce Development.

"Final order" means either a final administrative determination of the Commissioner, or other appropriate agency officer, issued following adjudication of a matter as a contested case pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., or where the Department or other appropriate agency has made a finding regarding a violation of any State wage, benefit, and tax laws, or regarding the levying of a penalty pursuant to any State wage, benefit, and tax laws, has notified the violator of the finding, and the violator has expressly waived the right to a hearing by virtue of having failed to request a hearing within the appropriate time limit established by either law or rule.

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"Person" means any natural person, company corporate officer or principal, firm, association, corporation, contractor, subcontractor, or other entity engaged in contracting.

"Public body" means the State of New Jersey, any of its political subdivisions, any authority created by the Legislature of the State of New Jersey, and any instrumentality or agency for the State of New Jersey, or any of its political subdivisions.

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

1. N.J.S.A. 34:11-4.1;
2. The New Jersey Prevailing Wage Act, N.J.S.A. 34:11-56.25;
3. The New Jersey State Wage and Hour Law, N.J.S.A. 34:11-56a;
4. The Workers' Compensation Law, N.J.S.A. 34:15-1;
5. The Unemployment Compensation Law, N.J.S.A. 43:21-1;
- [page=768] 6. The Temporary Disability Benefits Law, N.J.S.A. 43:21-25;
7. N.J.S.A. 43:21-39.1; and
8. The New Jersey Gross Income Tax Act, N.J.S.A. 54A:1-1.

### SUBCHAPTER 3. VIOLATIONS; PUNISHMENT; NOTICE OF INTENT

12:8-3.1 Posting of names to a list on the Department's website of persons prohibited from contracting with any public body

(a) Where a person has been found to be in violation of any State wage, benefit, or tax laws and where a final order has been issued against that person by the Commissioner, or other appropriate agency officer, for a violation of any State wage, benefit, or tax laws, the Department may post that person's name to a list on the Department's website of persons prohibited from contracting with any public body.

(b) The Commissioner shall consider the following factors as material in each decision to place a person on the list pursuant to (a) above:

1. The record of previous violations;
2. Previous placement on the list by the Commissioner;
3. The frequency of violations by the person in previous or still pending cases;
4. The significance or scale of the violations;
5. The existence of failure to pay;
6. Failure to cooperate or respond to a request to produce records, forms, documents, or proof of payments;
7. Submission of falsified or altered records, forms, documents, or proof of payments;
8. Failure to provide goods or services; and
9. Failure to comply with contract specifications.

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(c) When the Department seeks to post a name to the list of persons prohibited from contracting with any public body, the Department shall, 15 business days prior to the posting, furnish the person with a written Notice of Intent indicating the following:

1. The name, email address, and telephone number of a contact person at the Department and description of the procedure for removal of the posting;
2. The specific details concerning the violations and a copy of the unsatisfied court final judgment or final order for any violation of State wage, benefit, and tax laws;
3. Notification that the person shall be prohibited from contracting with any public body if the liability is not resolved; and
4. Notification that the person can request a hearing, in writing, to the Commissioner within 20 days of receipt of the Notice of Intent to place the person on the list.

(d) The Notice of Intent to post a name to the list on the Department's website of persons prohibited from contracting with any public body shall be mailed, by regular mail, or equivalent United States Postal Service option, and return receipt requested, to the person sought to be listed by the Department.

(e) A person who receives a Notice of Intent pursuant to (c) above shall have 20 days from receipt of the Notice of Intent to request a hearing.

(f) If the person has either failed to file a timely appeal, or has expressly waived its right to appeal, the name of the person shall be posted to the list on the Department's website of persons prohibited from contracting with any public body.

(g) All hearings pursuant to this section shall be conducted in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

(h) The posting pursuant to (a) above, of the name of a person to the Department's list of persons prohibited from contracting with any public body, shall not occur when, prior to the anticipated date for posting of the name on the Department's list, either the person satisfies the entirety of the outstanding liability ordered by the court or the Commissioner, or a settlement has been reached and all payments have been made pursuant to the settlement.

(i) Within 15 days after the Department determines that a person on the Department's list of persons prohibited from contracting with a public body has satisfied the entirety of the outstanding liability ordered by the court, the Commissioner, or other agency head, or made all payments pursuant to the settlement for a violation of any State wage, benefit, or tax laws, the Department shall remove the name of that person from the list of persons prohibited from contracting with any public body.