50 N.J.R. 2012(a)

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RULE ADOPTIONS

Reporter
50 N.J.R. 2012(a)

Agency

LABOR AND WORKFORCE DEVELOPMENT > INCOME SECURITY

Administrative Code Citation

Readoption with Amendments: *N.J.A.C. 12:16*

Text

Contributions, Records, and Reports

Proposed: March 19, 2018, at *50 N.J.R. 1026(a)*.

Adopted: July 27, 2018, by Robert Asaro-Angelo, Commissioner, Department of Labor and Workforce Development.

Filed: July 27, 2018, as R.2018 d.162, **with non-substantial changes** not requiring additional public notice and comment (see *N.J.A.C. 1:30-6.3*).

Authority: *N.J.S.A. 43:21-1* et seq.

Effective Date: July 27, 2018, Readoption;

September 17, 2018, Amendments.

Expiration Date: July 27, 2025.

Summary of Hearing Officer's Recommendation and Agency's Response:

A public hearing regarding the proposed readoption with amendment was held on April 10, 2018, at the Department of Labor and Workforce Development (Department). David Fish, Executive Director, Legal and Regulatory Services, was available to preside at the public hearing and to receive testimony. No one testified at the public hearing. Written comments were submitted directly to the Office of Legal and Regulatory Services. After reviewing the written comments, the hearing officer recommended that the Department proceed with the readoption with amendment with non-substantial changes not requiring additional public notice or comment (see *N.J.A.C. 1:30-6.3*).

Summary of Public Comments and Agency Responses:

Written comments were submitted by the following individuals.

1. Gail Toth, Executive Director, New Jersey Motor Truck Association, East Brunswick, New Jersey.

2. Jeff Bader, President, The Association of Bi-State Motor Carriers and President and CEO of Golden Carriers, Inc., Paramus, New Jersey.

3. Dick Jones, Executive Director, The Association of Bi-State Motor Carriers, Inc., Port Newark, New Jersey.

4. Phillip Gigante, President BBT Logistics, Inc., Newark, New Jersey.

5. Phillip Gigante, President BBT Logistics, Inc., Newark, New Jersey, submitted a single package containing form letters signed by individuals each of whom indicated that he or she is an owner-operator. Since the form letters submitted by the following commenters came in a single package from Mr. Gigante and since none of the letters contains an address for the individual commenter, no addresses will appear in the following list.

Lenin Ayala, Licinio Casho, Hermogenes E. Davila, Carter Pasteur, (illegible), Mark Kovalich, Samedi Hairry, Carlos Reynoso, Alexis Echeverria, Amilcar Gutierrez, Cabenson Casseus, Daniel Silva, Juan Areuab, Melchor Topia, (illegible), Flavio Garcia, Robert Ortiz, Delval Wint, Irving Povia, (illegible), Edward Pujols, Eiulin Pena, Juan Carlos Marlon Landais, (illegible), Fortunato Chavez, Perry Mancheon, Basil Smith, Ever Auguste, Chesnel Dorce, (illegible), John F. Santos, Jean Michel (illegible surname), Sederne Jean Jacques, Joaquin Rea, Bernard Saintelus, Jean Luxama, Hector R. Diaz.

6. John J. Nardi, President, New York Shipping Association, Inc., Edison, New Jersey.

7. James H. Cobb, Jr. Director of Governmental Affairs, New York Shipping Association, Inc., Edison, New Jersey.

8. Linda M. Doherty, President, New Jersey Food Council, Trenton, New Jersey.

9. Fred Potter, Vice President-at-Large and Port Division Director, International Brotherhood of Teamsters, Hazlet, New Jersey.

[page=2013] 10. Jim Bell, III, Chair, and Daniel Harris, Sr. Director, State Government Affairs, National Association of Professional Employer Organizations, Alexandria, Virginia.

11. Justin T. Worrell, Senior Regulatory Policy Manager, Trinet, San Leandro, California.

12. Joe Magiera, Atlantic Star Trucking.

The submitted comments and the Department's responses are summarized below. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

1. COMMENT: The commenter objects to the Department's proposed deletion of *N.J.A.C. 12:16-23.2(a)*4 on the basis that the amendment, which the commenter asserts would "eliminat[e] the ability to utilize the twenty-factor test," would be inconsistent with the legislative intent of Senate Bill 2840, which resulted in the adoption of *N.J.S.A. 43:21-19(i)(7)(X)*, an exemption from coverage under the New Jersey Unemployment Compensation Law (UCL), *N.J.S.A. 43:21-1* et seq., for services performed by certain motor carriers. The commenter concedes that the UCL expressly conditions the successful assertion of any one of the exemptions from coverage set forth at *N.J.S.A. 43:21-19(i)(7)*, including the sub-paragraph "X" exemption for certain motor carriers, on the establishment of a corresponding exemption from coverage under the Federal Unemployment Tax Act (FUTA). Nevertheless, the commenter maintains that for the Department to require an employer who seeks to assert the sub-paragraph "X" exemption to demonstrate the existence of a FUTA exemption either by citing to an exemption from FUTA coverage expressly set forth within the Federal law or, in the alternative, to obtain an Internal Revenue Service (IRS) audit, an IRS private letter ruling, or a determination letter from the IRS indicating that the subject services are, in fact, exempt from FUTA coverage, would be inconsistent with what the commenter characterizes as the Legislature's "clear intent to specifically exempt owner-operators of large motor vehicles, due to the independent nature of their

businesses, from the more stringent ABC test which is generally applied to determine unemployment contribution coverage under New Jersey law."

Regarding the ability of a motor carrier to obtain either a private letter ruling or determination letter from the IRS, the commenter maintains that the IRS does not respond to all requests for private letter rulings or determination letters; "preclude[s] in some instances analysis of situations from past tax years, and [determination letters and private letter rulings] may only be issued with respect to a 'specific set of facts.'" The commenter asserts that "[t]he vast majority of motor carriers will therefore not have in their possession, or the ability to obtain, the requisite IRS official documentation, and therefore the exemption will essentially be unusable by the vast majority of the industry..." The commenter maintains that, "even were IRS documentation obtained, it would likely be only for that particular owner-operator..."

In addition, the commenter takes issue with both (1) the Department's assertion within the Social Impact statement of the notice of proposal (see *50 N.J.R. 1026(a)*), that the proposed amendment would eliminate any possible confusion regarding when an employer has satisfied the statutory threshold test for establishing an exemption from UCL coverage under *N.J.S.A. 43:21-19(i)(7)*, (9), or (10); and (2) the Department's assertion within the Summary statement that *N.J.A.C. 12:16-23.2(a)*4 is problematic, in that it places the Department in an extremely difficult, if not untenable, position of having to ascertain, without the benefit of a determination from the IRS, whether the IRS's test for independence has been met relative to particular services. Specifically, the commenter states the following:

> "[T]here is no credible argument that deletion of this regulatory provision is necessary to alleviate any such confusion or difficulty. For one, motor carriers in the State of New Jersey have been operating under the existing statute and regulation for decades, and eliminating the ability to utilize the twenty-factor test would actually create confusion, requiring the industry as a whole to re-evaluate its long standing operations. Second, it is unclear why analysis of the twenty-factor test is deemed to be so difficult to the Department when other state agencies continue to utilize the twenty-factor test in determining their own state law classifications."

In support of the latter assertion regarding "other state agencies," the commenter cites to an unreported opinion in *Sharp v. Board of Trs.*, No. A-4614-11 (App. Div. , June 25, 2013), which according to the commenter, "note[s] that New Jersey's Division of Pensions and Benefits utilizes the twenty-factor test to determine whether a worker is an employee or independent contractor under its rules and regulations."

With respect to the trucking industry, in particular, the commenter states that "analysis of federal law is already required… [in that] motor carriers are required to adhere to federal requirements as set forth by the Federal Motor Carrier Safety Administration (FMCSA)," adding, "[a] number of the factors that the Department must assess and consider are actions federally mandated by the FMCSA." The commenter offers examples including its assertion that, "the Department has attempted to claim that when a motor carrier's independent contractor agreement with an owner-operator provides that the motor carrier retains exclusive possession and control of the truck, this indicates a level of control that suggests an employer-employee relationship," adding, "[h]owever, the FMCSA regulations require that all lease agreements contain this language..." On this subject, the commenter concludes,

"By claiming that the Department does not have the expertise to evaluate federal standards, such as the twenty factor test, the Department can conveniently claim that it does not have the ability to evaluate federal requirements under the FMCSA in its underlying audit and analysis. Therefore, motor carriers could be deemed to be employers simply and solely because they are adhering to federal motor carrier regulations. This is simply untenable."

Finally, the commenter asserts that the proposed amendment to *N.J.A.C. 12:16-23.2*, "arguably violates the Federal Aviation Administration Authorization Act of 1994, which provides States 'may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of any motor carrier.'" (Citation omitted.) The commenter adds, "[t]he proposed amendment undoubtedly will affect motor carrier prices and services by essentially eliminating a motor carrier's ability to utilize independent contractor owner-operators, resulting in significantly rising costs to motor carriers and customers." (1)

2. COMMENT: The commenter asserts that "[t]he current federal standard allows for the continued movement or products in a consistent and cost efficient manner," adding, "[i]ndependent contractors have operated under this existing regulation for decades, and changing this rule would create confusion within the industry and force independent contractors to completely change their processes." (8)

RESPONSE TO COMMENTS 1 AND 2: As to the commenter's main assertion; namely, that the proposed amendment to N.J.A.C. 12:16-23.2(a) is inconsistent with the Legislature's intent when it created the exemption from UCL coverage at N.J.S.A. 43:21-19(i)(7)(X) for certain motor carriers, the Department disagrees. The commenter maintains that it was the Legislature's "clear intent to specifically exempt owner-operators of large motor vehicles, due to the independent nature of their business, from the more stringent ABC test [at N.J.S.A. 43:21-19(i)(6)] which is generally applied to determine unemployment contribution coverage under New Jersey law." Indeed, the Legislature placed the sub-paragraph "X" exemption within N.J.S.A. 43:21-19(i)(7), not (i)(6), where the New Jersey test for independence (the ABC test) is found, thereby permitting those who wish to assert the sub-paragraph "X" exemption from UCL coverage to do so without having to satisfy the ABC test. However, the Legislature also expressly conditioned the assertion of any one of the exemptions from UCL coverage found at N.J.S.A. 43:21-19(i)(7), including the sub-paragraph "X" exemption, on the existence of a corresponding exemption for the services at issue from coverage under FUTA. Specifically, the very first sentence of N.J.S.A. 43:21-19(i)(7) indicates that the specialized exemptions listed therein, including the sub-paragraph "X" exemption, may only be asserted "[p]rovided that such services are also exempt under the Federal Unemployment Tax Act, as amended, or that contributions with respect to such services are not required to be paid into a state unemployment fund as a condition for a tax offset credit against the tax imposed by the [page=2014] Federal Unemployment Tax Act." The Department is not proposing to eliminate the exemption from UCL coverage for "owner-operators of large motor vehicles," as the commenter suggests. Rather, the Department is proposing to amend its own rules at N.J.A.C. 12:16-23.2, so as to make clear what constitutes evidence of a FUTA exemption. The commenter has cited nothing in the law or the legislative history, nor is there anything in the law or legislative history, to indicate that the Legislature intended for the Department to base its determination as to whether the services provided by a particular individual(s) are exempt from FUTA coverage on its own independent analysis under the IRS test for independence. Quite the contrary, again, the law expressly conditions successful assertion of any one of the specialized exemptions set forth at N.J.S.A. 43:21-19(i)(7) on the actual existence of a FUTA exemption. It is clear to the Department, as it should be to all, that only the IRS is in a position to determine whether particular services are exempt from coverage under FUTA, a law that the IRS, not the New Jersey Department of Labor and Workforce Development, enforces. In other words, where the UCL expressly conditions the successful assertion of an exemption for particular services from UCL coverage on the existence of a corresponding exemption for those services from coverage under FUTA, the Department does not see that its opinion as to whether the particular services should be exempt from coverage under FUTA, based on its own independent application of the IRS test for independence, is of any consequence; which is to say, even if the New Jersey Department of Labor and Workforce Development were to apply the IRS test for independence to a particular set of circumstances and announce its belief that the services at issue meet the IRS test, this does not equate to the existence of an actual exemption from FUTA coverage, which is what the law requires. The commenter's assertion that the Department should be expected to conduct its own independent analysis under the IRS test in order to determine the existence of a FUTA exemption simply because the court in *Sharp v. Board of Trs.*, *id.,* observed that the Division of Pensions and Benefits applies the 20-factor test for independence to determine under its law whether a worker is an employee or an independent contractor perfectly illustrates the disconnect between the position expressed by the commenter and the fundamental concept described by the Department above. That is, the commenter would have the Department believe that N.J.S.A. 43:21-19(i)(7) conditions successful assertion of any one of the specialized exemptions from UCL coverage listed therein on a determination by the Department of Labor and Workforce Development that the services at issue meet the IRS test for independence. It does not. Rather, as described in detail above, the UCL expressly conditions successful assertion of any one of these specialized exemptions on the actual existence of a corresponding FUTA exemption. Again, the only agency empowered by law to determine the existence of a FUTA exemption is the agency that enforces that law, namely the IRS. Thus, the holding in *Sharp*, *supra*, is entirely inapposite.

Incidentally, it is also important to note here, for the sake of clarity, that although this commenter and others refer to the IRS 20-factor test for independence and allege that the Department's amendment would "eliminat[e] the ability to utilize the twenty-factor test," in establishing the existence of a FUTA exemption, the IRS some years ago replaced its 20-factor test for independence with a new list of factors, less a list of 20 discrete factors and more an unnumbered listing of factors, sub-factors, and guidance divided into three separate categories: (1) Behavioral Control; (2) Financial Control; and (3) Type of Relationship. See IRS Publication 15-A (2018), Employer's Supplemental Tax Guide, for a description of the IRS test for independence. Thus, separate and apart from the justification for elimination of *N.J.A.C. 12:16-23.2(a)*4 provided by the Department above, the fact is that the IRS no longer uses the 20-factor test referred to within *N.J.A.C. 12:16-23.2(a)*4. The confusion that would arise from the New Jersey Department of Labor and Workforce Development independently issuing a finding with regard to whether a firm has met the IRS test for independence and, thereby, established the existence of a FUTA exemption, in the absence of a tangible determination having first been issued by the IRS (within whose exclusive jurisdiction the issue of FUTA exemption lies), would only be compounded by the continued existence of a rule that makes reference to a test for independence (the 20-factor test) that the IRS no longer uses. This is another reason to eliminate *N.J.A.C. 12:16-23.2(a)*4. It is also the reason that throughout this rulemaking notice (except when summarizing or quoting comments received by the Department in response to the rule proposal), the Department will refer to the "IRS test for independence," rather than the "20-factor test."

As to the commenter's discussion of the Federal Motor Carrier Safety Administration (FMCSA) and that agency's safety requirements for motor carriers, the Department fails to see the relevance to this particular rulemaking. For example, the commenter asserts that, "the Department has attempted to claim that when a motor carrier's independent contractor agreement with an owner-operator provides that the motor carrier retains exclusive possession and control of the truck, this indicates a level of control that suggests an employer-employee relationship." It is not clear from the comments when or where the Department is supposed to have "attempted to claim" this. What is clear, however, is that it has nothing whatsoever to do with the Department's proposed amendment. Under the proposed amendment to *N.J.A.C. 12:16-23.2(a)*, when evaluating a motor carrier's asserted exemption under *N.J.S.A. 43:21-19(i)(7)(X)*, the Department would not be conducting any independent analysis under the IRS test for independence; it would not be evaluating whether any particular factor indicates a level of control that suggests an employment relationship. Rather, under the rule, as amended, once it has been established by the motor carrier that the underlying requirements of *N.J.S.A. 43:21-19(i)(7)(X)* have been met (namely, that the services were performed by operators of motor vehicles weighing 18,000 pounds or more, licensed for commercial use and used for highway movement of motor freight, who own their equipment or who lease or finance the purchase of their equipment through an entity that is not owned or controlled directly or indirectly by the entity for which the services were performed and who were compensated by receiving a percentage of the gross revenue generated by the transportation move or by a schedule of payment based on the distance and weight of the transportation move), the Department would simply ask the motor carrier to produce an IRS determination letter, an IRS letter ruling, or an IRS audit. If, under those circumstances, the motor carrier was able to produce either an IRS determination letter, an IRS letter ruling, or an IRS audit containing an IRS determination that the services in question are exempt from FUTA coverage, the Department would consider the services exempt from UCL coverage under *N.J.S.A. 43:21-19(i)(7)(X)*. If not, the motor carrier would be unable to assert the sub-paragraph "X" exemption. It is that simple. In fact, as explained in the notice of proposal, and above, the entire purpose of the proposed amendment is that the Department would no longer be conducting its own analysis under the IRS test for independence in order to determine the existence of a FUTA exemption.

With regard to the commenter's assertion that the IRS does not respond to all requests for private letter rulings or determination letters and that, therefore, "[t]he vast majority of motor carriers will … not have in their possession, or the ability to obtain, the requisite IRS documentation," the Department, again, disagrees. The lone document cited by the commenter in support of the above assertion is IRS Bulletin No. 2018-1, which contains a list of circumstances where the IRS ordinarily does not issue letter rulings or determination letters. Among the circumstances listed are where the requestor is seeking a determination as to which of two entities is the employer when one entity is treating the worker as an employee; where the request comes from an entity other than the putative employer, such as where the request comes from a business, trade, or industrial association concerning the application of the tax laws to members of the group (although the Bulletin adds that groups or associations may

submit suggestions of generic issues that could be appropriately addressed in revenue rulings); where the requestor is seeking a determination as to the tax consequences of a transaction for taxpayers who are not directly involved in the request if the requested letter ruling or determination letter would not address the tax status, liability, or reporting obligations of the requestor; where the requestor is a foreign government or a political subdivision of a foreign government, when the request is about the U.S. tax effects of their laws; where the request for a determination is on a frivolous issue (examples provided include frivolous "constitutional" claims, such as claims that the requirement to file tax [page=2015] returns and pay taxes constitutes an unreasonable search barred by the Fourth Amendment, violates the Fifth and Fourteenth Amendment protections of due process, or violates the Thirteenth Amendment protections against involuntary servitude; and claims that income taxes are voluntary, that the term "income' is not defined in the IRS code, or that preparation of Federal income tax returns violates the Paperwork Reduction Act); and on proposed transactions or on hypothetical situations. Nothing within IRS Bulletin No. 2018-1, or within any other IRS publication of which the Department is aware, indicates that a firm seeking a determination letter from the IRS as to the status of a worker or workers under the IRS test for independence for purposes of Federal unemployment taxes and income tax withholding will be denied such a letter by the IRS. Quite the contrary, the instructions for Federal Form SS-8, entitled, Determinations of Worker Status for Purposes of Federal Taxes and Income Tax Withholdings, encourage firms to use the SS-8 process expressly for the purpose of obtaining a determination from the IRS as to the status of a worker or workers under the IRS test for independence. The instructions also contain the following guidance for firms:

> If you are requesting a determination for a particular class of worker, complete the form for one individual who is representative of the class of workers whose status is in question. If you want a written determination for more than one class of workers, complete a separate Form SS-8 for one worker from each class whose status is typical of that class. A written determination for any worker will apply to other workers of the same class if the facts are not materially different for these workers.

Thus, the IRS not only encourages firms to seek determinations of worker status using Form SS-8, but also permits firms to obtain a determination regarding a class of workers based on an IRS analysis of a single representative worker. The instructions also state the once the Form SS-8 has been submitted, the case will be assigned to a technician who will review the facts, apply the law, and render a decision. In other words, among the express purposes of the Federal Form SS-8 is to ensure that firms may, in the most efficient manner possible (through an informal fact-finding conducted by an IRS "technician" and for an entire class of workers based on an analysis of one representative worker), obtain a binding IRS determination of the status of a worker or workers under the IRS test for independence for the purpose of establishing whether the services provided by that worker or workers are exempt from FUTA coverage. Consequently, the commenter's assertion that the vast majority of motor carriers will not have in their possession, or the ability to obtain, the requisite IRS documentation, is baseless. It is certainly understandable (although hardly laudable) that motor carriers not currently paying FUTA taxes on behalf of motor vehicle operators would prefer not to invite IRS scrutiny of their business practices; however, this reluctance on the part of a firm or firms to seek a binding IRS determination regarding the status of their workers under FUTA cannot be permitted to dictate New Jersey Department of Labor and Workforce Development policy regarding administration of the UCL. The UCL, at *N.J.S.A. 43:21-19(i)(7)* and (i)(1)(G), expressly requires that in order to successfully assert any of the specialized exemptions from UCL coverage set forth within *N.J.S.A. 43:21-19(i)(7)*, (9), or (10), including the sub-paragraph "X" exemption, one must establish the existence of a corresponding FUTA exemption. The Department's decision to eliminate *N.J.A.C. 12:16-23.2(a)*4, thereby requiring those who seek to assert a specialized exemption from UCL coverage under *N.J.S.A. 43:21-19(i)(7)*, (9), or (10), to obtain a tangible determination from the IRS as to the status of the worker or workers under FUTA, is for the reasons described above sound. Of course, it is important to note that where a motor carrier, or any other firm that might otherwise seek to assert a specialized exemption from UCL coverage under *N.J.S.A. 43:21-19(i)(7)*, (9), or (10), decides that it would prefer not to request a determination from the IRS as to the status of its worker or workers under FUTA, because it does not want to invite IRS scrutiny into its business practices, this does not mean that those services are necessarily covered under the UCL; which is to say, such a firm always has the option, as does any New Jersey firm doing business in whatever industry, to establish that the services at issue are exempt from UCL coverage under the New Jersey test for independence set forth at *N.J.S.A. 43:21-19(i)(6)*, otherwise known as the "ABC test."

Finally, as to the commenter's suggestion that the proposed amendment violates the Federal Aviation Administration Authorization Act of 1994 (FAAAA), because it would "affect motor carrier prices and services by essentially eliminating a motor carrier's ability to utilize independent contractor owner-operators, resulting in significantly rising costs to motor carriers and customers," the Department disagrees. Specifically, the Department disagrees with, among other things, the commenter's underlying premise that the amendment would "essentially eliminate a motor carrier's ability to utilize independent contractor owner-operators." As explained in detail above, under the proposed amendment to *N.J.A.C. 12:16-23.2(a)*, in order to meet its burden under *N.J.S.A. 43:21-19(i)(7)(X)* to establish the existence of a FUTA exemption as a condition to successful assertion of the specialized sub-paragraph "X" exemption from UCL coverage, a motor carrier could simply file Form SS-8 to request a determination of worker status under the IRS test for independence and, thereby, obtain an IRS determination letter. In the event that the motor carrier is reluctant to invite IRS scrutiny of its business practices, as mentioned earlier, it always has the option of foregoing assertion of the sub-paragraph "X" exemption and opting to establish through proofs that it meets the New Jersey test for independence set forth at *N.J.S.A. 43:21-19(i)(6)* (the ABC test). In either event, no one is eliminating a motor carrier's ability to utilize independent contractor owner-operators.

3. COMMENT: The commenters urge the Department not to take action on the proposed amendment to *N.J.A.C. 12:16-23.2* "until the newly-formed Task Force on Employee Misclassification has had an opportunity to provide advice and recommendations ...," adding, "[a]ny action taken prior to the release of the Task Force's report would be premature and ill-advised." (2 and 6)

RESPONSE: The commenter is conflating two separate and distinct issues. Executive Order No. 25 (2018) directs that a Task Force on Employee Misclassification be established to "[provide] advice and recommendations to the Governor's Office and Executive Branch departments and agencies on strategies and actions to combat employee misclassification." The proposed amendment is not an action "to combat employee misclassification." Rather, as explained both above and in the March 19, 2018 notice of proposal, the amendment would ensure adherence by the Department to the requirement set forth within *N.J.S.A. 43:21-19(i)(7)* and (i)(1)(G) that no firm should be permitted to assert a specialized exemption from UCL coverage under *N.J.S.A. 43:21-19(i)(7)*, (9), or (10), unless there exists a corresponding exemption from coverage under FUTA. The UCL does not state that successful assertion of a specialized exemption from UCL coverage under the aforecited sections of the law is conditioned upon an independent determination by the Department of Labor and Workforce Development that the IRS test for independence has been met. Rather, it states that such a specialized exemption from UCL coverage is condition upon the actual existence of a corresponding FUTA exemption and, as indicated earlier, the only agency empowered to determine the existence of a FUTA exemption is the agency that enforces FUTA, namely, the IRS. The elimination of *N.J.A.C. 12:16-23.2(a)*4 is a long overdue change to the Department's rules, dictated by the express terms of the UCL. There is no need to delay this amendment during the deliberations of the Task Force on Employee Misclassification or for any other reason.

4. COMMENT: The commenters express "strong opposition to the current proposal by the NJ Department of Labor: to eliminate the 20-factor test for independent contractors in our state as acceptable evidence that services are exempt from coverage under the Federal Unemployment Tax Act (FUTA)," adding, "[p]lease help preserve and protect the flexibility that the owner-operator model brings to our intermodal community, which is essential to the continued success of commerce at our port." In the same vein, one of the commenters also states that "[i]f the 20-factor test is eliminated, this would trigger a massive amount of paperwork and red tape for businesses that have not received official IRS rulings or determinations, just to prove that the workers they hire as independent contractors are exempt from FUTA coverage." (3, 4, 5, and 12)

[page=2016] RESPONSE: As indicated in the Response to Comments 1 and 2, the Department is not "eliminat[ing] the 20-factor test for independent contractors in our state as acceptable evidence that services are exempt from coverage under [FUTA]," as the commenter asserts. Firms seeking to assert one of the specialized exemptions from UCL coverage at *N.J.S.A. 43:21-19(i)(7)*, (9), and (10) will continue to be required as a condition to successful assertion of the exemption to establish the existence of a corresponding FUTA exemption. This requirement is expressly set forth within the UCL. Such firms will also continue to be able to establish the existence of a FUTA exemption by demonstrating that the services in question meet the IRS test for independence; only now, such firms

will be required to present their evidence on the issue of FUTA exemption under the IRS test for independence to the only agency empowered by law to make that determination, namely, the IRS. Once a firm seeking to assert a specialized exemption from UCL coverage under *N.J.S.A. 43:21-19(i)(7)*, (9), or (10) has the IRS determination on FUTA exemption in hand, successful assertion of the specialized exemption from UCL coverage will be as simple as establishing that the subject services meet the underlying exemption criteria; for example, under *N.J.S.A. 43:21-19(i)(7)(X)*, that the services were performed by operators of motor vehicles weighing 18,000 pounds or more, licensed for commercial use and used for highway movement of motor freight, who own their equipment or who lease or finance the purchase of their equipment through an entity which is not owned or controlled directly or indirectly by the entity for which the services were performed, and who were compensated by receiving a percentage of the gross revenue generated by the transportation move or by a schedule of payment based on the distance and weight of the transportation move.

5. COMMENT: The commenter expresses "serious concern" for the "potential for adverse economic impact on the Port Industry which relies heavily [upon] the deployment of independent contractor truck drivers to move goods to and from the Port Authority of NY/NJ and our regional marketplace." The commenter adds, "[i]f the effort to clarify the 'ABC test' requirements for independent contractor status under *N.J.S.A. 43:21-19(i)(6)* results in changes that jeopardize or eliminate the right of people to pursue careers as independent drivers, the economic ripple effect would be detrimental to the effort to sustain the robust job and economic growth currently occurring in a variety of industry segments within the goods movement industry." (7)

RESPONSE: As indicated in the response to prior comments, the amendment to *N.J.A.C. 12:16-23.2(a)* is not an effort to clarify the ABC test requirements for independent contractor status under *N.J.S.A. 43:21-19(i)(6)*. In fact, it has nothing whatsoever to do with the ABC test requirements for independent contractor status under *N.J.S.A. 43:21-19(i)(6)*. Rather, the amendment pertains exclusively to the obligation of a firm seeking to assert a specialized exemption from UCL coverage under *N.J.S.A. 43:21-19(i)(7)*, (9), or (10), to establish as a condition to successful assertion of the specialized exemption the existence of a corresponding FUTA exemption. Again, the Department is not eliminating the specialized exemption from UCL coverage set forth at *N.J.S.A. 43:21-19(i)(7)(X)*, nor is it eliminating the ability of a firm seeking to assert that exemption to obtain a determination that the services at issue meet the IRS test for independence, thereby, establishing the existence of a FUTA exemption and entitlement to the sub-paragraph "X" exemption from UCL coverage (provided that the remaining criteria for the exemption are met).

6. COMMENT: The commenter supports the proposed readoption with amendment of *N.J.A.C. 12:16*. With specific regard to the proposed amendment, the commenter states the following:

> The Teamsters support this amendment because it will allow the Department to properly apply the law and make it easier for both workers and employers to determine whether a worker has been appropriately classified, for purposes of unemployment.Under the current regulation, the New Jersey Department of Labor ends up having to analyze whether an employer meets the criteria promulgated by the IRS. As a practical matter, this means that the Department of Labor has to try and divine how the IRS might rule on the facts before it. It is hard to characterize this as even an educated guess, given that the Department is forced to apply criteria it had no role in creating and, thus, no background as to its meaning and application.Even worse, from the standpoint of workers and particularly employers, is the fact that the Department's determination may ultimately be rendered meaningless should the IRS subsequently make a determination as to a worker's status. As it stands now, an employer could walk out of the Department of Labor with a finding that it owed no unemployment taxes under New Jersey law and receive a determination tomorrow from the IRS levying employment taxes under the Internal Revenue code. Paragraph (a)4 should be eliminated so that the Department is not in the position of analyzing whether a company meets the criteria of the IRS test. That analysis can readily be performed by the IRS.

(9)

RESPONSE: The Department thanks the commenter for his support.

7. COMMENT: Relative to the readoption of *N.J.A.C. 12:16-24.11*, which states that it is the obligation of an employee leasing company to provide workers' compensation insurance for its covered employees, the commenters advise that the New Jersey statute governing employee leasing companies was amended in 2017 to allow either the employee leasing company or the client company to provide workers' compensation insurance for covered employees, so long as certain requirements set forth within the law are met. See P.L. 2017, c. 233. Consequently, the commenters suggest that *N.J.A.C. 12:16-24.11* be changed on adoption, so as to ensure consistency between the statute and the rules. (10 and 11)

RESPONSE: The Department will make the suggested change on adoption, which simply ensures consistency between the statute and the rules on this narrow point and which does not enlarge or curtail either the scope of the rules or those who will be affected by them.

Federal Standards Statement

The rules readopted with amendments do not exceed standards imposed by Federal law. Specifically, the subject rules are consistent with the Federal Unemployment Tax Act, *26 U.S.C. §§ 3301* et seq., and the regulations promulgated in accordance therewith, 20 CFR Part 601. Consequently, no Federal standards analysis is required.

Regulations

Full text of the readopted rules can be found in the New Jersey Administrative Code at *N.J.A.C. 12:16*.

Full text of the adopted amendments follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

CHAPTER 16

CONTRIBUTIONS, RECORDS, AND REPORTS

SUBCHAPTER 23. SERVICES EXCLUDED FROM COVERAGE BY THE UNEMPLOYMENT COMPENSATION LAW

12:16-23.2 Evidence of FUTA exemption

(a) Evidence that services are not covered under FUTA may include among other things:

1. (No change.)

2. An employment tax audit conducted by the Internal Revenue Service after 1987 which determined that there was to be no assessment of employment taxes for the services in question; however, the determination must not have been the result of the application of Section 530 of the Revenue Act of 1978; or

3. Determination letter(s) from the Internal Revenue Service.

(b) (No change.)

SUBCHAPTER 24. EMPLOYEE LEASING COMPANIES

12:16-24.11 Workers' compensation insurance

[(a) It is the obligation of the employee leasing company to provide workers' compensation insurance for their covered employees. Policies may be issued by any insurance carrier licensed by the State of New Jersey. Policies shall indicate that the employee leasing company is the labor contractor for each client company, by name.]

[page=2017]***Provision of workers' compensation insurance to covered employees is governed by *N.J.S.A. 34:8-68*.a(8).***