

[50 N.J.R. 1026\(a\)](#)

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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 > INCOME SECURITY

Administrative Code Citation

Proposed Readoption with Amendment: [N.J.A.C. 12:16](#)

Text

Contributions, Records and Reports

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

Authority: [N.J.S.A. 43:21-1](#) et seq.

[page=1027] Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2018-028.

A public hearing on the notice of rules proposed for readoption with an amendment will be held on the following date at the following location:

Tuesday, April 10, 2018

10:00 A.M.

NJ Department of Labor and Workforce Development

John Fitch Plaza

12th Floor, Large Conference Room

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 May 18, 2018, to:

David Fish, Executive Director

Office of Legal and Regulatory Services

NJ Department of Labor and Workforce Development

PO Box 110-13th Floor

Trenton, New Jersey 08625-0110

E-mail: david.fish@dol.nj.gov

The agency proposal follows:

Summary

Pursuant to [N.J.S.A. 52:14B-5.1](#), [N.J.A.C. 12:16](#), Contributions, Records and Reports, was scheduled to expire on February 10, 2018. As the agency submitted this notice of proposal to the Office of Administrative Law prior to that date, the expiration date was extended 180 days to August 9, 2018, pursuant to [N.J.S.A. 52:14B-5.1.c\(2\)](#). The Department of Labor and Workforce Development (Department) has reviewed [N.J.A.C. 12:16](#) and, with the exception of the amendment described in detail below, has determined the rules to be necessary, reasonable, and proper for the purposes for which they were originally promulgated. Accordingly, the Department proposes that [N.J.A.C. 12:16](#) be readopted with amendment.

A summary of the subchapters proposed for readoption follows:

N.J.A.C. 12:16-1 addresses the need for a Social Security number when identifying workers who are subject to the Unemployment Compensation Law.

N.J.A.C. 12:16-1A sets forth definitions of words and terms used throughout the chapter.

N.J.A.C. 12:16-2 requires that employers keep certain records, including payroll records, individual worker records, and Federal and State tax returns. This subchapter also requires that records be kept at the place of business of the employing unit and be maintained for the current calendar year, as well as the preceding four years. Additionally, the subchapter allows inactive employers to destroy records where there is no longer a need for claims information.

N.J.A.C. 12:16-3 lists the conditions which must be met in order for an employer to grant power of attorney to another person for the purposes of representing the employer before the Employment Security Agency.

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N.J.A.C. 12:16-4 addresses the use of the term "remuneration," within the Unemployment Compensation Law, and provides guidance with regard to whether certain specific types of payments to employees constitute "remuneration."

N.J.A.C. 12:16-5 concerns employer contributions and the manner in which such contributions must be paid.

N.J.A.C. 12:16-6 addresses the reimbursement options for unemployment insurance financing available to non-profit organizations.

N.J.A.C. 12:16-7 addresses the conditions under which a governmental entity can choose the contributory option and under which a governmental entity or instrumentality using the contributory method of financing unemployment insurance may use surplus monies remaining in an unemployment trust fund.

N.J.A.C. 12:16-8 addresses group accounts for the purpose of sharing the risk of unemployment benefit costs for two or more employers liable for payments in lieu of contributions.

N.J.A.C. 12:16-9 addresses employers' responsibility for withholding and paying worker contributions and for providing each worker with evidence of such amounts withheld.

[N.J.A.C. 12:16-10](#) addresses the refund of excess deductions made from an individual worker's wages and deposited into the trust funds for unemployment compensation, disability benefits, and workforce development partnership, and the method by which a worker may make application for a refund of such excess deductions.

N.J.A.C. 12:16-11 addresses certain special employment situations, including real estate managing agents and limited liability companies.

N.J.A.C. 12:16-12 addresses both concurrent employment by related employers and common paymasters.

N.J.A.C. 12:16-13 outlines the reports to be submitted by employers, the penalties applicable for failure to file reports, and the procedures for requesting penalty abatement.

N.J.A.C. 12:16-14 concerns election of coverage. Specifically, the subchapter provides that any employing unit may elect to become subject to the Unemployment Compensation and Temporary Disability Benefits Laws in order to extend coverage to individuals performing services that do not constitute covered employment. It also sets forth the requirements for such voluntary election of coverage.

N.J.A.C. 12:16-15 concerns the establishment of voluntary joint accounts, whereby two or more employers are permitted to maintain joint accounts for the purposes of complying with [N.J.S.A. 43:21-7](#) of the Unemployment Compensation Law. This subchapter also addresses the effective date, duration, modification, and dissolution of such an arrangement.

N.J.A.C. 12:16-16 requires that employers provide notice to employees that they are covered by the Unemployment Compensation Law.

[N.J.A.C. 12:16-17](#) is reserved.

N.J.A.C. 12:16-18 addresses the transfer of employment experience from one employer to a successor in interest.

N.J.A.C. 12:16-19 addresses benefit charges and provides that the Department must notify the employer of benefits charged to his or her account.

N.J.A.C. 12:16-20 explains the conditions which must be met by an unemployment work-relief or work-training program that is financed or assisted in whole or in part by a Federal agency, State agency, or political sub-division of a State, in order to qualify for the exemption provided by [N.J.S.A. 43:21-19\(i\)\(1\)\(D\)\(v\)](#).

N.J.A.C. 12:16-21 requires that all employers report employee statistics concerning zip codes to the Department of Transportation.

N.J.A.C. 12:16-22 outlines the procedures for hearings involving questions of coverage, status, liability for contributions, reporting, refunds, or rates of contributions. The subchapter also provides for informal conferences, formal hearings, final determinations by the Commissioner, and appeals to the Appellate Division of the New Jersey Superior Court.

N.J.A.C. 12:16-23 addresses the services that are excluded from coverage under the Unemployment Compensation Law.

N.J.A.C. 12:16-24 sets forth the requirements which must be met by an employee leasing company, also known as a professional employer organization (PEO), in order to be registered by the Department. Among these requirements are initial and annual registration, proof of financial security, payroll tax certification, and proof of workers' compensation insurance. The subchapter also addresses the dissolution of an employee leasing arrangement and rescission of registration by the Department.

Following is a description of the amendment proposed by the Department:

The Department is proposing an amendment to delete [N.J.A.C. 12:16-23.2\(a\)4](#). Paragraph (a)4 lists as acceptable evidence that services are exempt from coverage under the Federal Unemployment Tax Act (FUTA), "[d]ocumentation of responses to the 20 tests required by the Internal Revenue Service to meet its criteria for independence," adding, "[t]hese tests are enumerated in IRS Revenue Rule 87-41." Paragraphs (a)1, 2 and 3 state that the following constitutes evidence that services are exempt from FUTA coverage:

1. Private letter ruling(s) from the Internal Revenue Service; [page=1028]
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.

By way of background, there are 26 specialized exemptions from coverage under the New Jersey Unemployment Compensation Law (UCL), [N.J.S.A. 43:21-1](#) et seq., which appear at [N.J.S.A. 43:21-19\(i\)\(7\)](#), (9), and (10) and which employers may assert with relation to certain enumerated services, separate and apart from the exemption from coverage under the UCL that an employer may assert relative to services that meet the State's "ABC test" for independent contractor status under [N.J.S.A. 43:21-19\(i\)\(6\)](#). For example, [N.J.S.A. 43:21-19\(i\)\(7\)\(K\)](#) contains a special exemption for, "services performed by real estate salesmen or brokers who are compensated wholly on a commission basis"; [N.J.S.A. 43:21-19\(i\)\(7\)\(M\)](#) contains a special exemption for, "service performed for or in behalf of the owner or operator of any theater, ballroom, amusement hall or other place of entertainment, not in excess of 10 weeks in any calendar year for the same owner or operator, by any leader or musician of a band or orchestra, commonly called a 'name band,' entertainer, vaudeville artist, actor, actress, singer or other entertainer." However, in order to assert one of these 26 specialized exemptions from coverage under the UCL, the law states that the services for which the exemption is sought must also be exempt under FUTA. See [N.J.S.A. 43:21-19\(i\)\(7\)](#) and (i)(1)(G). Thus, the Department promulgated [N.J.A.C. 12:16-23.2](#), Evidence of FUTA exemption, in order to establish what the Department would consider to be proper evidence of the existence of a FUTA exemption. As indicated above, the rule contains four enumerated types of evidence, the first three of which are tangible documents from the IRS, such as an IRS private letter ruling, an IRS determination letter, or an employment tax audit conducted by the IRS, containing the results of an actual evaluation or adjudication by the IRS relative to the particular services involved and the issue of FUTA coverage. The last of the enumerated types of evidence--that is the one at [N.J.A.C. 12:16-23.2\(a\)4](#), which the Department is seeking to delete through this rulemaking--would appear to authorize an adjudication by the Department in a State administrative proceeding of a Federal exemption for the purpose of determining whether a putative employer may assert one of the above-mentioned 26 specialized exemptions from UCL coverage for particular services.

As to the Department's justification for the proposed amendment, it is the Department's position 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. Consequently, it is the Department's position that it would be advisable to eliminate [N.J.A.C. 12:16-23.2\(a\)4](#) altogether, so as to appropriately limit what constitutes evidence of a FUTA exemption to IRS private letter rulings, IRS determination letters, and employment tax audits conducted by the IRS; what is referred to earlier as tangible documents from the IRS containing the results of an actual evaluation or adjudication by the IRS relative to the particular services involved and the issue of FUTA coverage.

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 rules proposed for readoption would have a positive social impact in that they would enable the Department to continue to provide needed unemployment compensation and temporary disability coverage to all workers in a timely and efficient manner. In particular, they would continue to require employers to submit detailed reports concerning wages and the payment of contributions. The rules would also continue to have a positive impact on the stability of the Unemployment Compensation and State Disability Benefit Funds by keeping pace with current technology, to ensure that the wage data and contributions needed for the payment of unemployment and temporary disability insurance benefits are received from employers via the most timely and accurate methods of transmission.

The proposed amendment would have a positive social impact in that it 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). That is, with the elimination of [N.J.A.C. 12:16-23.2\(a\)4](#), it would be clear that in order to establish the existence of a corresponding FUTA exemption, an employer would be required to produce either an IRS private letter ruling, an IRS determination letter, or an employment tax audit conducted by the IRS after 1987, which determined that there was to be no assessment of employment taxes for the services in question.

Economic Impact

The rules proposed for readoption would have no significant economic impact upon employers or workers. Employer wage reporting and contribution payment requirements have been in existence for many years. Any employer costs associated with [N.J.A.C. 12:16-5.3](#) and [13.7](#), which would require certain wage reports and contribution payments to be transmitted via electronic means, are far outweighed by the Department's responsibility to ensure that the reports and payments needed for unemployment insurance, temporary disability benefit, and family leave insurance benefit payments are received in a timely and accurate manner.

The proposed amendment would have a positive economic impact on employers in that having a better understanding of the Department's policy regarding evidence of a FUTA exemption for the purpose of asserting a specialized exemption from UCL coverage under [N.J.S.A. 43:21-19\(i\)\(7\)](#), (9), or (10), should help them avoid running afoul of the UCL and their responsibility thereunder to remit contributions on behalf of employees to the Unemployment Compensation Trust Fund, thereby incurring fewer administrative penalties for failure to remit.

Federal Standards Statement

The rules proposed for readoption with amendment would 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.

Jobs Impact

The rules proposed for readoption with amendment would not have an impact on jobs. The Department does not anticipate that there would be an increase or decrease in jobs as a result of the rules proposed for readoption with amendment.

Agriculture Industry Impact

The rules proposed for readoption with amendment would have no impact on the agriculture industry.

Regulatory Flexibility Analysis

The rules proposed for readoption would have minimal impact in terms of imposing additional burdens upon businesses of any type, including small businesses as defined by the Regulatory Flexibility Act, [N.J.S.A. 52:14B-16](#) et seq. All employers are required to submit reports concerning withholding, payroll records, remuneration paid, and contributions to the Department of Labor and Workforce Development, and must provide employees with certain notices and worker contribution statements. Although some employers may have to employ the services of bookkeepers and/or accountants to prepare the necessary documentation, the records must be provided by all employers regardless of size, as the success of the unemployment compensation and temporary disability insurance programs is dependent on the Department's ability to accumulate accurate information regarding the entire State workforce. The recordkeeping and reporting costs for small businesses would most likely be less than those for larger employers since such expenses are generally directly proportionate to the number of workers employed. The rules would continue to educate employers as to the Department's policies and procedures related to Unemployment Compensation, Temporary Disability Benefits and Workforce Development Partnership Laws, so as to eliminate confusion and [page=1029] unnecessary expense caused by failure to comply with reporting requirements.

The proposed amendment 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. Specifically, under the proposed amendment to [N.J.A.C. 12:16-23.2](#), the Department would only consider the following to constitute proof of a FUTA exemption: an IRS private letter ruling, an IRS determination letter, or an employment tax audit conducted by the IRS after 1987, which determined that there was to be no assessment of employment taxes for the services in question. The elimination of [N.J.A.C. 12:16-23.2\(a\)](#)⁴ would impose no new requirements on businesses, large or small. Rather, as required by law, in order for a business to successfully assert a specialized exemption from UCL coverage under [N.J.S.A. 43:21-19\(i\)\(7\)](#), (9), or (10), it does now and would continue to have the burden of proving the existence of a corresponding FUTA exemption. See [N.J.S.A. 43:21-19\(i\)\(7\)](#) and (i)(1)(G). The proposed amendment to [N.J.A.C. 12:16-23.2](#) would simply make clear what constitutes sufficient evidence of a FUTA exemption.

Housing Affordability Impact Analysis

The rules proposed for readoption with amendment would not evoke a change in the average costs associated with housing. The basis for this finding is that the rules proposed for readoption with amendment pertain to contributions, recordkeeping, and reports as they relate to the Unemployment Compensation Fund, Temporary Disability Benefits Fund, and the Workforce Development Partnership Fund, not housing.

Smart Growth Development Impact Analysis

The rules proposed for readoption with amendment 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. The basis for this finding is that the rules proposed for readoption with amendment pertain to contributions, recordkeeping, and reports as they relate to the Unemployment Compensation Fund, Temporary Disability Benefits Fund, and Workforce Development Partnership Fund and have nothing to do with housing production, either within Planning Areas 1 or 2, within designated centers, under the State Development and Redevelopment Plan or anywhere in the State of New Jersey.

Regulations

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at [N.J.A.C. 12:16](#).

Full text of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [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 [; and/or].
- [4. Documentation of responses to the 20 tests required by the Internal Revenue Service to meet its criteria for independence. These tests are enumerated in IRS Revenue Rule 87-41.]

(b) (No change.)

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