

52 N.J.R. 1673(b)

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RULE ADOPTIONS

Reporter

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> LABOR AND WORKFORCE DEVELOPMENT -- DIVISION OF WAGE AND HOUR COMPLIANCE***

Agency

LABOR AND WORKFORCE DEVELOPMENT > DIVISION OF WAGE AND HOUR COMPLIANCE

Administrative Code Citation

Adopted Concurrent New Rules: N.J.A.C. 12:70

Text

Prohibited COVID-19 Related Employment Discrimination

Proposed: April 20, 2020, at 52 N.J.R. 933(a).

Adopted: August 10, 2020, by Robert Asaro-Angelo, Commissioner, Department of Labor and Workforce Development.

Filed: August 10, 2020, as R.2020 d.081, **without change**.

Authority: P.L. 2020, c. 9.

Effective Date: August 10, 2020.

Expiration Date: August 10, 2027.

Summary of Hearing Officer's Recommendations and Agency's Responses:

The period for submission of written comments to the Department's Office of Legal and Regulatory Services regarding the concurrent proposed new rules ended on June 19, 2020. The Department received a [page=1674] written comment from a single commenter. After reviewing the written comment, the hearing officer recommended that the Department proceed with adoption of the concurrent new rules without change.

Summary of Public Comment and Agency Response:

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A written comment was submitted by Cassandra Gomez, Staff Attorney, A Better Balance, New York, NY (also, on behalf of the National Employment Law Project and New Jersey Citizen Action).

The submitted comment and the Department's response is summarized below.

COMMENT: The commenter "as a whole, strongly support[s] these regulations [N.J.A.C. 12:70]." Specifically, the commenter indicates that she supports, (1) the Department's definition of the terms "employ," "employee," and "employer" within N.J.A.C. 12:70-1.2; (2) N.J.A.C. 12:70-1.3(a), which contains the statutory entitlement to reinstatement following a period of protected leave; (3) N.J.A.C. 12:70-1.4, which contains the statutory prohibition against retaliation for taking or requesting protected leave; (4) N.J.A.C. 12:70-1.5, which lists the remedies available to an aggrieved employee; and (5) N.J.A.C. 12:70-1.8, which indicates that the statutory "ABC test," found at N.J.S.A. 43:21-19(i)(6), will be used to determine whether an individual is an employee or an independent contractor under the new chapter. The commenter adds the following recommendation:

As written, we believe that the State legislature's intention in passing P.L. 2020, c. 9, was to create protections for workers in addition to pre-existing protections as provided by other federal, state and local laws, including the Family and Medical Leave Act (FMLA), Families First Coronavirus Response Act (FFCRA), Americans with Disabilities Act (ADA), New Jersey Family Leave Act (NJFLA), New Jersey Temporary Disability Benefits Law, New Jersey Earned Sick Leave Law, and the New Jersey Law Against Discrimination (LAD). We urge the Department to make this abundantly clear in the rules and accompanying guidance.

RESPONSE: The Department thanks the commenter for her support. As to the commenter's recommendation, the concurrent proposed new rules set forth procedures for the processing of complaints filed under P.L. 2020, c. 9. For example, the concurrent proposed new rules explain that a complaint filed with the Commissioner under P.L. 2020, c. 9, will be processed in the same manner as would a claim for wages before the Wage Collection Section within the Department's Division of Wage and Hour Compliance. The concurrent proposed new rules also indicate that any appeal of a judgment of the Wage Collection Section with regard to a complaint filed with the Commissioner under P.L. 2020, c. 9, will follow the procedure set forth at N.J.S.A. 34:11-63 for the appeal of a judgment of the Wage Collection Section. The commenter's suggestion is simply outside the scope of the concurrent proposed new rules. Consequently, the Department declines to make any change on adoption.

Federal Standards Statement

A Federal standards analysis is not required because the concurrent new rules are not subject to any Federal standards or requirements. Specifically, the concurrent new rules are governed by P.L. 2020, c. 9 (N.J.S.A. 34:11D-12 and 13), a State statute. Accordingly, no Federal standards statement is required.

Full text of the adopted concurrent new rules follows:

CHAPTER 70

PROHIBITED COVID-19 RELATED EMPLOYMENT DISCRIMINATION

SUBCHAPTER 1. GENERAL PROVISIONS

12:70-1.1 Purpose and scope

(a) The purpose of this chapter is to effectuate P.L. 2020, c. 9, which, during the Public Health Emergency and State of Emergency declared by Governor Murphy in Executive Order No. 103 (2020) concerning the coronavirus disease 2019 (COVID-19) pandemic, prohibits an employer from terminating or otherwise penalizing an employee, if the employee requests or takes time off from work based on the written or electronically transmitted recommendation of a medical professional licensed in New Jersey that the employee take that time off for a specified period of time because the employee has, or is likely to have, an infectious disease that may infect others at the employee's workplace.

(b) The chapter shall apply to employers and employees.

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12:70-1.2 Definitions

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

"Act" means P.L. 2020, c. 9.

"Commissioner" means the Commissioner of the Department of Labor and Workforce Development, or his or her designee.

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

"Employ" means to suffer or permit to work.

"Employee" includes any individual employed by an employer.

"Employer" includes any individual, partnership, association, corporation, and the State and any county, municipality, or school district in the State, or any agency, authority, department, bureau, or instrumentality thereof, or any person, or group of persons, acting directly or indirectly in the interest of an employer in relation to an employee.

"Infectious disease" means "infectious disease" as that term is defined at N.J.S.A. 26:13-2.

"Medical professional licensed in New Jersey" means a physician, physician assistant, advanced practice nurse, or registered nurse who is appropriately licensed by the State of New Jersey.

"Protected leave" means leave from work taken by an employee during the Public Health Emergency and State of Emergency declared by Governor Murphy in Executive Order No. 103 (2020) concerning the coronavirus disease 2019 (COVID-19) pandemic, based on the written or electronically transmitted recommendation of a medical professional licensed in New Jersey that the employee take that time off for a specified period of time because the employee has, or is likely to have, an infectious disease that may infect others at the employee's workplace.

12:70-1.3 Reinstatement

(a) Upon expiration of a period of protected leave, an employee shall be restored to the position such employee held immediately prior to the commencement of the protected leave, with no reduction in seniority, status, employment benefits, pay, or other terms and conditions of employment. If such position has been filled, the employer shall reinstate such employee to an equivalent position of like seniority, status, employment benefits, pay, and other terms and conditions of employment.

(b) If, during a period of protected leave, the employer experiences a reduction in force or layoff and the employee would have lost the employee's position had the employee not been on leave, as a result of the reduction in force or pursuant to the good faith operation of a bona fide layoff and recall system including a system under a collective bargaining agreement, where applicable, the employee shall not be entitled to reinstatement to the former or an equivalent position. The employee shall retain all rights under any applicable layoff and recall system, including a system under a collective bargaining agreement, as if the employee had not taken the protected leave.

12:70-1.4 Prohibited retaliation

No employer shall discharge or in any way retaliate against or penalize any employee because such employee requests or takes protected leave.

12:70-1.5 Administrative remedies

(a) When the Commissioner finds that an employer has violated the Act, the Commissioner is authorized to order:

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1. Reinstatement of the employee to employment in the position held when the protected leave commenced with no reduction in seniority, status, employment benefits, pay, and other terms and conditions of employment, or if such position has been filled, reinstatement of the employee to an equivalent position of like seniority, status, employment benefits, pay, and other terms and conditions of employment; and/or
2. The assessment of an administrative penalty against the employer of \$ 2,500 for each violation of the Act.

12:70-1.6 Processing of complaints

(a) Any complaint filed with the Commissioner that alleges a violation of the Act or of this chapter shall be processed in the same manner as a claim for wages filed with the Division of Wage and Hour Compliance, [page=1675] Wage Collection Section, within the Department pursuant to N.J.S.A. 34:11-57 et seq.

(b) Hearings of the Division of Wage and Hour Compliance, Wage Collection Section, under this chapter, may be conducted remotely with the assistance of technology, such as telephone, web-based video conferencing, and submission of documentary evidence by email or text.

12:70-1.7 Appeals

An appeal from a judgment of the Division of Wage and Hour Compliance, Wage Collection Section, under this chapter shall follow the procedure set forth at N.J.S.A. 34:11-63.

12:70-1.8 Independent contractor status

The criteria in the Unemployment Compensation Law at N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), commonly referred to as the "ABC test," and the case law interpreting and applying the ABC test to potential employment relationships shall be used to determine whether the individual is an employee or an independent contractor under the Act and this chapter.

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