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RULE PROPOSALS

Reporter

55 N.J.R. 2314(a)

**NJ - New Jersey Register 2023 NOVEMBER NOVEMBER 20, 2023 RULE
PROPOSALS LABOR AND WORKFORCE DEVELOPMENT -- DIVISION OF UNEMPLOYMENT
INSURANCE**

▶ Interested Persons Statement

Agency

LABOR AND WORKFORCE DEVELOPMENT > DIVISION OF UNEMPLOYMENT INSURANCE

Administrative Code Citation

Proposed Amendments: N.J.A.C. 12:17-2.1, 3.1, 3.2, and 21.3

Proposed New Rule: N.J.A.C. 12:17-3.8

Text

Separation and Wage Information

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

Authority: N.J.S.A. 43:21-1 et seq., specifically, 43:21-7.g.

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

Proposal Number: PRN 2023-114.

Submit written comments by January 19, 2024, to:

David Fish, Executive Director
Office of Legal and Regulatory Services
PO Box 110
Trenton, New Jersey 08625-0110
Email: david.fish@dol.nj.gov

The agency proposal follows:

Summary

The Department of Labor and Workforce Development (Department) is proposing amendments at N.J.A.C. 12:17-2.1, 3.1, 3.2, and 21.3, and a proposed new rule at N.J.A.C. 12:17-3.8, to implement P.L. 2022, c. 120; specifically, that part of P.L. 2022, c. 120, which amended N.J.S.A. 43:21-6 to require the following:

1. The Department's Division of Unemployment Insurance (Division) must provide all employers "in advance" with "directions ... regarding what information the Division requires employers to provide to the Division by electronic means immediately upon a separation from employment sufficient to enable the Division to make a benefit determination, including any information relevant to whether the individual may be disqualified pursuant to subsections (a), (b), (d), or (e) of [N.J.S.A.] 43:21-5";
2. The "directions" provided to all employers by the Division "in advance," "shall include that each employer provide the Division with an email address for communications to and from the Division";
3. "When an employer provides benefit instructions to the individual which disclose the date on which unemployment will commence, the employer shall immediately and simultaneously provide by electronic means that disclosure to the Division together with the information required by the Division pursuant to the directions provided in advance by the Division";
4. "An employer who fails to make the immediate and simultaneous disclosure to the Department as required ... shall be liable for the penalties imposed by subsection (b) of N.J.S.A. 43:21-16 on employers for willful failure to furnish reports";
5. "The Division shall notify the employer by electronic means not more than seven calendar days after the Department receives the disclosure of any failure of the employer to provide all of the information needed by the Division to make a benefit determination";
6. Notwithstanding the statutory requirement that employers provide information to the Division by electronic means, and the requirement for the Division to provide notifications to an employer by electronic means, "the Commissioner shall have the discretion to establish by rule an alternate method or methods for employers to provide the required information to the Division and for the Division to provide the required notifications to an employer in circumstances where it is established, to the satisfaction of the Commissioner, that the employer is unable to provide the information to the Division or is unable to receive notifications from the Division by electronic means"; and
7. "Whenever an initial determination is based upon information other than that supplied by an employer because such employer failed to provide information as required at the time of separation from employment, and failed to respond to the deputy's request for additional information, ... such initial determination and any subsequent determination thereunder shall be incontestable by the noncomplying employer, as to any charges to his employer's account because of benefits paid prior to the close of the calendar week following the receipt of his reply."

To implement the above listed amendments at N.J.S.A. 43:21-6, which resulted from P.L. 2022, c. 120, the Department is proposing the following:

1. A proposed amendment at N.J.A.C. 12:17-2.1, which would add a definition for the term "Instructions for Reporting Separation and Wage Information." The "Instructions for Reporting Separation and Wage Information" would be the "directions" required pursuant to N.J.S.A. 43:21-6.a, as amended at P.L. 2022, c. 120, to be provided by the Division to each employer "in advance [of an employee's separation from employment]" regarding what information the Division would need from the employer upon separation of an employee from employment that would be "sufficient to enable the Division to make a benefit determination" and which, pursuant to N.J.S.A. 43:21-6.a, as amended at P.L. 2022, c. 120, would instruct each employer to provide the Division with an email address for communications to and from the Division.
2. Proposed amendments at N.J.A.C. 12:17-3.1, which currently addresses "instructions to workers at time of separation" would be expanded to include all "employer responsibilities at time of separation." Specifically, whereas, N.J.A.C. 12:17-3.1 currently requires that whenever a worker is separated from employment for any reason, the employer must provide the worker at the time of separation with the Department form entitled "Instructions for Claiming Benefits," which tells the worker to report to a Department Reemployment Call Center by telephone or through the Internet to file a claim for benefits; N.J.A.C. 12:17-3.1, as amended, would also require that at the time of separation the employer provide the worker with the date upon which the individual became unemployed, and in the case that the unemployment is temporary, to the greatest extent possible, the date upon which the individual is expected to be recalled to work; as well as notification to the worker that they may lose some or all of the benefits to which they are entitled if they fail to file a claim in a timely manner. In addition, N.J.A.C. 12:17-3.1, as amended, would require that at the time of separation the employer immediately provide, by electronic means to the Division, using the electronic form prescribed by the Division, the date upon which the individual became or will become unemployed, and the information required by the Division pursuant to the "Instructions for Reporting Separation and Wage Information." The proposed amendments would define the term "immediately" to mean no later than the end of the business day following the date of the employee's separation from employment and would indicate that failure to comply with the requirement to provide information to the Division immediately upon an employee's separation from employment pursuant to the "Instructions for Reporting Separation and Wage Information" will subject the employer to the penalties prescribed at N.J.S.A. 43:21-1(b) for willful failure to furnish reports. Finally, the proposed amendments at N.J.A.C. 12:17-3.1 would indicate that the Division will notify the employer by electronic means not more than seven calendar days after it receives information that has been furnished by the employer using the prescribed electronic form (immediately upon an employee's separation from employment), whether any of the fields required on the electronic form prescribed by the Division were not completed by the employer.
3. Proposed amendments at N.J.A.C. 12:17-3.2, which would address requests by the Division to the employer for separation or wage information after the filing of a claim for benefits, including the requirement that within seven calendar days after the filing of a claim for benefits, the Division examine any disclosure of information that was made by the employer upon the employee's separation from employment (prior to the filing of a claim for benefits) and by electronic means notify the employer: (1) that information relevant to the Division's determination regarding claim eligibility or disqualification is missing; and (2) that the missing information must within seven calendar days be furnished to the Division by electronic means. The proposed amendments would also indicate that upon the filing of a claim for benefits, the Division will provide the claimant with any information that had been furnished to the [page=2315] Division by the employer upon the employee's separation from employment, and that upon receipt by the Division of any additional information from the employer, the Division will also provide that information to the claimant. Finally, the proposed amendments would, in accordance with P.L. 2022, c. 120, change the time for an employer to respond to a request from the Division for separation or wage information from 10 calendar days to seven calendar days.
4. Proposed new N.J.A.C. 12:17-3.8 would address requests for waiver of the electronic reporting requirement for employers, both prescribing the method for the making of such a request and establishing the standard to be used by the Division when evaluating whether good cause has been presented by the employer for the Division to grant such a request. Specifically, regarding the latter, the new rule would define the term "good cause," to mean that the employer has provided to the Division a signed, sworn affidavit, in a form prescribed by New Jersey Court Rule 1:4-4, which affidavit shall state that the employer has no access to a computer, through any means, for the purpose of communicating electronically with the Division.
5. Proposed amendments at N.J.A.C. 12:17-21.3 indicating that an employer who may otherwise be eligible to obtain relief of benefit charges, shall not obtain relief of benefit charges if it fails to provide to the Division: (1) the information that is required immediately upon an employee's separation from employment; (2) any information that is required by the Division upon the filing of a claim for benefits; or (3) any additional information requested by the Division.

As the Department has provided a 60-day public 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 vast majority of the proposed amendments and new rule either mirror P.L. 2022, c. 120, or are necessitated by P.L. 2022, c. 120. Therefore, whatever positive or negative social impact might be felt would derive in the first instance from the law and not the proposed amendments and new rule. As to the remainder of the proposed amendments and new rule, it is the Department's belief that they would have a positive social impact, in that they would minimize any possible confusion as to such issues as to what constitutes "good cause" for a waiver of the electronic reporting requirement, and what is meant by "immediately," when the law states that the employer must "immediately ... provide by electronic means ... to the Division ... the information required by the Division pursuant to the directions provided in advance by the Division." The proposed amendments would also make clear that the Division will be using an electronic form to solicit separation and wage information from the employer "immediately" upon the individual's separation from employment, and that the nature of the Division's initial review of the information so provided (within seven calendar days of its receipt, as required by P.L. 2022, c. 120) will be to determine, likely through an automated process, whether the employer has failed to complete any of the required fields on the electronic form.

Economic Impact

As indicated in the Social Impact statement above, the vast majority of the proposed amendments and new rule either mirror P.L. 2022, c. 120, or are necessitated pursuant to P.L. 2022, c. 120. Therefore, whatever positive or negative economic impact might be felt by employers and claimants, would derive in the first instance from the law, not the proposed amendments and new rule. That would include the possibility that, as a result of the changes to the law and rules, benefit claims may be determined more quickly. As to those portions of the proposed amendments that address the levying of penalties by the Department against those employers who fail to timely provide separation or wage information, they would, of course, have a negative impact upon those employers who run afoul of the law's and rules' reporting requirements. Finally, as to the remainder of the proposed amendments and new rule, it is the Department's belief that they would have a positive economic impact in that they would minimize any possible confusion as to the employers' obligations relative to the reporting of separation and wage information. It is the Department's hope that minimizing confusion as to this issue will avoid the costs of unnecessary litigation, which might otherwise result.

Federal Standards Statement

The proposed amendments and new rule do not exceed standards or requirements imposed by Federal law or regulation. Specifically, the proposed amendments and new rule 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 proposed amendments and new rule would have no impact on either the generation or loss of jobs.

Agriculture Industry Impact

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

Regulatory Flexibility Analysis

The proposed amendments and new rule would impose both reporting and compliance requirements on all employers, including those that are small businesses, as that term is defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. That is, as indicated earlier, pursuant to the pertinent provisions at P.L. 2022, c. 120, and the proposed amendments and new rule proposed through this notice, employers, including those that are small businesses, would be required to furnish separation and wage information to the Division electronically immediately upon an employee's separation from employment and would be required to communicate electronically with the Division in response to subsequent requests from the Division for such information. Presumably, because electronic communication is quicker than communication through the mail, pursuant to P.L. 2022, c. 120, and the proposed amendments and new rule, the time limit for responding to post-claim Division requests for separation and wage information would be shortened from 10 calendar days to seven calendar days. However, as indicated in the proposed amendments and new rule, the Division will be providing an electronic form for use by employers in providing separation and wage information immediately upon an employee's separation from employment. This electronic form will be user-friendly and

should ease the administrative burden on small businesses. There is also the option pursuant to proposed new N.J.A.C. 12:17-3.8 for small businesses that do not have access to a computer for the purpose of communicating electronically with the Division to request a waiver of the electronic reporting requirement for "good cause" shown. The Department does not anticipate that professional services will be required in order to comply with the proposed amendments and new rule.

Housing Affordability Impact Analysis

The proposed amendments and new rule would not evoke a change in the average costs associated with housing. The basis for this finding is that the proposed amendments and new rule pertain to the reporting of separation and wage information in relation to claims for unemployment insurance benefits. The proposed amendments and new rule have nothing to do with housing.

Smart Growth Development Impact Analysis

The proposed amendments and new rule 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 proposed amendments and new rule pertain to the reporting of separation and wage information in relation to claims for unemployment insurance benefits. Therefore, the proposed amendments and new rule have nothing whatsoever to do with 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 of the Department has evaluated this rulemaking and determined that it 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]):

[page=2316] 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.

. . .

"Instructions for Reporting Separation and Wage Information" means the directions required pursuant to N.J.S.A. 43:21-6.a to be provided by the Division to each employer in advance of an employee's separation from employment regarding what information the Division would need from the employer upon separation that would be sufficient to enable the Division to make a benefit determination, and which would instruct each employer to provide the Division with a viable email address for communications to and from the Division. The "Instructions for Reporting Separation and Wage Information" may also direct employers to register for use of electronic means of communication with the Division other than email, such as an employer access portal.

. . .

SUBCHAPTER 3. REPORTING OF WAGE AND SEPARATION INFORMATION

12:17-3.1 [Instructions to workers] **Employer responsibilities** at time of separation

(a) Whenever a worker is separated from work (permanently, temporarily, or for an indefinite period) for any reason, at the time of the separation, the employer shall [deliver] **immediately do the following:**

1. Deliver to the worker the Department form entitled, "Instructions for Claiming Unemployment Benefits," instructing the worker to report to a Department Reemployment Call Center by telephone or [via] **through** the Internet at www.njuifile.net to file a claim for benefits. Such instructions shall contain the employer's name, complete address, and New Jersey Employer Identification Number[.], **as well as the date upon which the individual became unemployed, and, in the case that the unemployment is temporary, to the extent possible, the date upon which the individual is expected to be recalled to work; and that the individual may lose some or all of the benefits that they are entitled to if they fail to file a claim in a timely manner; and**

2. Provide by electronic means to the Division, using an electronic form prescribed by the Division, the date upon which the individual became or will become unemployed, and the information required by the Division pursuant to the Instructions for Reporting Separation and Wage Information.

i. For the purpose of this paragraph "immediately" shall mean no later than the end of the business day following the date of the employee's separation from work.

(b) Failure to comply with [this] **the** requirement **set forth at (a)1 above**, may subject the employer to the penalties prescribed [in] **at** N.J.S.A. 43:21-16(c). However, it shall not relieve the claimant of the responsibility of reporting to file an unemployment claim.

(c) Failure to comply with the requirement set forth at (a)2 above shall subject the employer to the penalties prescribed at N.J.S.A. 43:21-16(b) for willful failure to furnish reports.

(d) The Division shall notify the employer by electronic means not more than seven calendar days after it receives information furnished by the employer pursuant to (a)2 above, whether any of the fields required on the electronic form prescribed by the Division were not completed by the employer.

12:17-3.2 [Request] **Upon the filing of a claim for benefits;** separation or wage information

(a) Within seven calendar days after the filing of a claim for benefits, the Division shall examine any disclosure of information that was made to the Division by the employer as required pursuant to N.J.A.C. 12:17-3.1(a)2, along with the claim for benefits, and by electronic means shall notify the most recent employer and, successively as necessary, each employer in inverse chronological order during the base year, of the filing of the claim.

(b) The notification from the Division to the employer pursuant to (a) above, shall require that the employer, not more than seven calendar days after receipt of the notification, furnish to the Division by electronic means, any information which the employer had failed to provide upon the separation from employment as required pursuant to N.J.A.C. 12:17-3.1(a)2 and that the Division determines is relevant to its determination regarding claim eligibility or disqualification.

(c) Upon the filing of a claim, the Division shall provide the claimant with any information furnished to the Division by the employer pursuant to N.J.A.C. 12:17-3.1(a)2.

(d) Upon receipt by the Division of any additional information from the employer pursuant to (b) above, the Division shall provide the claimant with that additional information.

[(a)] **(e) Upon notification pursuant to (b) above, or a request by the Division for information regarding wages or the reason for separation from any worker from employment, the employer shall, within [10] seven calendar days after [the date of mailing of the form requesting information, complete and return it to the appropriate office. The response shall be considered timely if it is postmarked or received by the Division within 10 calendar days after the date of mailing] a communication by electronic means of the notification or request, provide to the Division by electronic means the information required by the Division in the notification or request.**

[(b)] **(f) Failure to comply with any request for information, including a request made in the notification pursuant to (b) above, shall subject the employer to the penalties prescribed [in] at** N.J.S.A. 43:21-16(b)(1).

[(c)] **(g) If an employer fails to respond to a request for wage information within [10] seven calendar days after [the mailing date] receipt of a request or after receipt of the notification pursuant to (b) above, the Division shall rely on information from other sources, including an affidavit from the claimant certifying wages and time worked. If available, the affidavit should be supported by evidence of wages and employment including, but not limited to, payroll stubs, W-2 forms, Federal or State income tax returns, copies of pay checks, etc.**

1. An individual who claims or attempts to claim benefits through [false or fraudulent representation] **a knowing, fraudulent nondisclosure or misrepresentation** shall be subject to disqualification [under] **pursuant to** N.J.S.A. 43:21-5(g) and fines and the refund of benefits [under] **pursuant to** N.J.S.A. 43:21-16.

Recodify existing (d)-(f) as **(h)-(j)** (No change in text.)

12:17-3.8 Requests for waiver of electronic reporting requirement

(a) An employer may apply to the Division for a waiver of the requirement that it provide information to the Division and receive notifications from the Division by electronic means, including the requirement pursuant to N.J.S.A. 43:21-6(a) that the employer provide the Division with an email address for communications to and from the Division, and the requirement pursuant to N.J.S.A. 43:21-6(a) and N.J.A.C. 12:17-3.1(a)2 that the employer provide the Division by electronic means both the date upon which an employee became or will become unemployed, and the information required by the Division pursuant to the Instructions for Reporting Separation and Wage Information.

(b) An application for a waiver pursuant to (a) above, shall be filed, in writing, with the Director of the Division at PO Box 058, One John Fitch Plaza, Trenton, New Jersey, 08625-0058, on a form supplied by the Division and available upon request. Such requests may be made in-person at a physical Department location, through the mail, or by telephone.

(c) An application for a waiver pursuant to (a) above, shall document the reasons for the employer's inability to comply with the electronic communication requirement and shall specify the format that the employer proposes to use to receive notifications from the Division and submit information to the Division.

(d) An application for a waiver pursuant to (a) above, shall only be granted when the employer has established to the satisfaction of the Division that there exists good cause for the waiver.

1. For the purpose of this section, the term "good cause" shall mean that the employer has provided to the Division a signed, sworn affidavit, in the form prescribed by New Jersey Court Rule 1:4-4, which affidavit shall state that the employer has no access to a [page=2317] computer, through any means, for the purpose of communicating electronically with the Division.

(e) Where the Division has granted the waiver pursuant to (d) above, 14 calendar days shall be added to any existing deadline for notification by the Division to the employer or for the employer to provide information to the Division.

(f) An application for a waiver that is granted by the Division pursuant to this section shall be valid until June 30 of the following year, unless otherwise limited by the Division.

(g) If the conditions that necessitated the waiver are corrected or no longer exist, the employer shall notify the Division, and the waiver shall become void.

(h) If the reasons necessitating the waiver persist, the employer shall, by June 30 of each year apply to the Division for a renewal of the waiver.

SUBCHAPTER 21. RELIEF FROM BENEFIT CHARGES**12:17-21.3 Request for separation information**

[(a) For an employer to obtain relief of benefit charges, he or she shall complete the Department form entitled, "Notice to Employer of Monetary Determination and Request for Separation Information," and additional requests for separation information, where determined necessary by the Division. The separation information shall include a comprehensive statement of facts surrounding the separation from work. The Department form entitled, "Notice to Employer of Monetary Determination and Request for Separation Information," shall be completed and returned to the office that initiated the request within 10 calendar days after the date upon which the form requesting information was mailed. Any additional separation information requested by the Division shall be completed and returned to the office that initiated the request within 21 calendar days after the date upon which the request was mailed.

(b) Relief of benefit charges shall not be granted if either the Department form entitled, "Notice to Employer of Monetary Determination and Request for Separation Information" is not received by the Division or postmarked within 10 calendar days after the date upon which the form requesting information was mailed, or if any additional separation information requested by the Division is not received or postmarked within 21 calendar days after the date upon which the request for additional information was mailed, unless the employer shows good cause for failing to do so.]

(a) An employer that may otherwise be eligible to obtain relief of benefit charges, shall not obtain relief of benefit charges if it fails to do any of the following:

1. Immediately upon the separation of an employee from work (permanently, temporarily, or for an indefinite period) for any reason, in accordance with N.J.A.C. 12:17-3.1(a)2, provide to the Division the information required by the Division pursuant to the "Instructions for Reporting Separation and Wage Information."

i. For the purpose of the requirement in this paragraph, the term "immediately," shall mean no later than the end of the business day following the date of the employee's separation from work;

2. After the filing of a claim for benefits, in response to the notification provided to the employer by the Division, in accordance with N.J.A.C. 12:17-3.2(a), provide the Division with the information requested in the notification within seven calendar days of receipt of that notification; or

3. Within seven calendar days after the date upon which the Division makes any additional request for separation information, provide such information to the Division.

(b) The separation information provided to the Division by the employer shall include a comprehensive statement of facts surrounding the separation from work.

(c) If the employer can show good cause for the failure to provide separation information under any of the circumstances listed at (a) above, then the failure to provide separation information shall not act as a bar to the employer obtaining relief of benefit charges.

[[c]] **(d)** (No change in text.)

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