



David Fish, Executive Director
Office of Legal and Regulatory Services
N.J. Department of Labor & Workforce Development
P.O. Box 110 – 13th Floor
Trenton, New Jersey 08625

November 5, 2010

Re: Proposed New Rule: N.J.A.C. 12:235-13.7, Stop-Work Order

Dear Mr. Fish:

Please accept the following comments on Proposed New Rule: N.J.A.C. 12:235-13.7 on behalf of the Employers Association of New Jersey (EANJ).

For the most part, the proposed new rule mirrors relevant provisions of N.J.S.A. 34:15-79 but, among other things, includes a definition of the term “knowing” in connection with a stop-work order issued by the Director of the Division of Workers’ Compensation.

The relevant section of the proposed new rule provides that an employer shall be subject to a stop-work order if it:

1. Knowingly fails to provide workers’ compensation coverage, or
2. Knowingly misrepresents one more employees as independent contractors, or
3. Knowingly provides false, incomplete or misleading information concerning the number of employees.

A violation shall be considered to be “knowing” under three conditions, essentially dealing with past conduct. They are summarized as follows:

1. If the employer had workers’ compensation insurance and canceled, discontinued or didn’t renew coverage, or
2. When the employer has been advised of the need for coverage, or
3. If the employer had previous violations.

EANJ believes that as the proposed new rule currently reads is ambiguous as to what constitutes a knowing violation. In *KOLSTAD V. AMERICAN DENTAL ASSN.*, 527 U.S. 526 (1999), the Supreme Court of the United States discussed the standard for imposing punitive damages under federal fair labor laws. The case is instructive in clarifying the state of mind evidence necessary to show a knowing or intentional violation.

In *KOLSTAD*, the Court observed that eligibility for punitive awards is characterized in terms of a defendant's motive or intent. "Accordingly, 'a positive element of conscious wrongdoing is always required,' "citing C. McCormick, Law of Damages 280 (1935).

Likewise, EANJ suggests that the extraordinary act of unilaterally issuing a stop-work order prior to a hearing based on a knowing violation should be supported by evidence of conscious wrongdoing.

The proposed new rule basically provides that a knowing violation can be inferred from past behavior. Yet, it is unclear in the proposed rule whether the enumerated past behaviors are related present violations. Therefore, EANJ suggests the insertion of "with the intent to violate the statutory obligation to provide workers' compensation coverage" to clarify the term "knowingly." For example, proposed N.J.A.C. 12:235-13.7 (a) would provide:

Besides any other penalties, remedies or sanctions as provided statute or regulation, an employer who, with the intent to violate the statutory obligation to provide workers' compensation coverage, knowingly fails to provide workers' compensation coverage, or knowingly misrepresents one or more employees as independent contractors, or who knowingly provides false, incomplete or misleading information concerning the number of employees, shall be subject to a stop-work order by the Director of the Division of Workers' Compensation.

As it follows, (b) can be revised as follows:

The following factors shall be considered in determining whether a violation under (a) shall be considered to be "intentional and knowing"

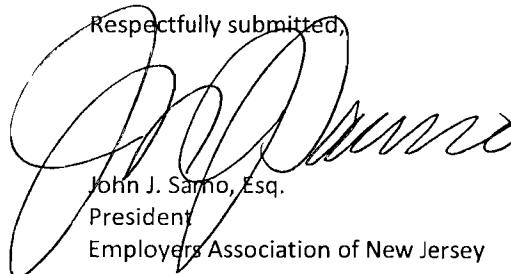
EANJ believes the above amendatory language more properly supports the extraordinary and punitive remedy of a unilateral stop-work order prior to a hearing.

Additionally, EANJ offers the following comments on the hearing to finalize the stop-work order.

The primary purpose of the hearing provided in proposed N.J.A.C. 12:235-13.7 (e) is to permit the employer the opportunity to present evidence and/or to rebut the Directors evidence of a knowing (and intentional) violation on which to support the unilateral issuance of a stop-work order. However, fundamental due process should allow the employer an opportunity, upon a proper showing, to continue operating its business before a final determination on the merits. Therefore, EANJ suggests the following new section, (e) 3:

The Director shall have the authority to stay or otherwise hold in abeyance, or to modify, a stop-work order, for good cause shown, pending a final decision.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read "John J. Sarno".

John J. Sarno, Esq.
President
Employers Association of New Jersey