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RULE ADOPTIONS

Reporter

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Agency

LABOR AND WORKFORCE DEVELOPMENT > OFFICE OF THE COMMISSIONER

Administrative Code Citation

Adopted New Rules: N.J.A.C. 12:8

Text

Listing of Persons Prohibited from Contracting with Any Public Body Due to a Violation of State Wage, Benefit, or Tax Laws

Proposed: May 17, 2021, at 53 N.J.R. 766(a).

Adopted: February 7, 2022, by Robert Asaro-Angelo, Commissioner, Department of **Labor and Workforce Development**.

Filed: February 7, 2022, as R.2022 d.032, **without change**.

Authority: N.J.S.A. 34:1-20 and 34:1A-1.16.

Effective Date: March 7, 2022.

Expiration Date: March 7, 2029.

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

After reviewing the written comments submitted directly to the Department of **Labor and Workforce Development**'s (Department) Office of Legal and Regulatory Services, the hearing officer, David Fish, Executive Director, Legal and Regulatory Services, recommended that the Department proceed with the new rules without change.

Summary of Public Comments and Agency Responses:

Written comments were submitted by Ray Cantor, Vice President of Government Affairs, New Jersey Business and Industry Association, Trenton, NJ.

COMMENT: The commenter observes that with the proposed new rules, "the Department is largely implementing the legislative mandate in [N.J.S.A. 34:1A-1.16]," but adds, "we also believe that these proposed rules can be burdensome and overly punitive to impacted businesses." The commenter explains that the online posting of persons prohibited from contracting with any public body due to a violation of State wage, benefit or tax laws, "can result in an immediate loss of revenue opportunities for businesses barred from receiving public contracts," adding, "[although] the statute includes measures to avoid, remove or appeal postings, which may mitigate some short-term losses, there will likely be lingering reputational damage."

The commenter observes that proposed N.J.A.C. 12:8-3.1(b) contains a list of factors to be considered by the Commissioner when determining whether to place a person on the list of those prohibited from contracting with any public body due to a violation of State wage, benefit, or tax laws, acknowledging that the list is taken verbatim from N.J.S.A. 34:1A-1.16.g. Nevertheless, the commenter asserts that the proposed new rule provides "no objective criteria to guide the Commissioner" in the exercise of his or her discretion to place a person on the list.

The commenter encourages the Commissioner to "use heightened discretion regarding the public posting of names to the online list due to the significant financial implications for these businesses," adding, "[w]hen the Commissioner does decide to post a name, the rational [sic] for that decision, based on the factors listed in the law and regulations, should also be detailed."

Finally, the commenter suggests "that a stay be put in place if a business requests a hearing on the Commissioner's decision to post, or if the business has contested the final order to the Appellate Division or other appropriate entity."

RESPONSE: As the commenter correctly observes, the proposed new rules mirror N.J.S.A. 34:1A-1.16, which expressly empowers the Department to post to a list on the Department's website of persons prohibited from contracting with any public body, the name of any person found to be in violation of any State wage, benefit, or tax laws when a final order to that effect has been issued against the person by the Commissioner or other appropriate agency officer. The statute defines the terms "State wage, benefit and tax laws," and "final order," among other terms, and the Department's regulatory definitions for each of the terms defined within the statute is taken verbatim from the statute. The factors set forth in the proposed new rules to be considered by the Department when determining whether to place a person on the above-mentioned list are taken verbatim from the statute. The form of notice, the right to request a hearing, the time limit to request a hearing, the procedure for avoiding the placement of a person's name on the list prior to the anticipated date for posting, the procedure for removal of a person's name from the list, are all contained in the statute and are all reflected either verbatim or near verbatim in the proposed new rules. Thus, the Department must decline to act on the commenter's suggestion that the Department apply some unspecified "objective" criteria to the question of whether to place a person's name on the list, separate and apart from the factors expressly set forth in the statute, which are reflected verbatim at proposed new N.J.A.C. 12:8-3.1(b)1 through 9. Specifically, both N.J.S.A. 34:1A-1.16.g(1) through (9) and proposed N.J.A.C. 12:8-3.1(b)1 through 9 state that the Commissioner shall consider the following factors as material in each decision to place a person on the list:

- (1) The record of previous violations;
- (2) Previous placement on the list by the Commissioner;
- (3) The frequency of violations by the person discovered in previous or still pending cases;
- (4) The significance or scale of the violations;
- (5) The existence of failure to pay;
- (6) Failure to cooperate or respond to a request to produce records, forms, documents, or proof of payments;
- (7) Submission of falsified or altered records, forms, documents, or proof of payment;

(8) Failure to provide goods or services; and

(9) Failure to comply with contract specifications.

Incidentally, all but one of these criteria are, in fact, objective, and the one subjective criterion; namely, criterion 4, "[t]he significance or scale of the violations," is entirely appropriate for inclusion on this list, as it, or some variation on it, appears in every list of factors within Title 12 of the New Jersey Administrative Code to be considered by the Commissioner when determining the appropriate penalty or sanction to be imposed for a violation of law or rule. For example, N.J.A.C. 12:55-1.6(c), which contains factors to be considered by the Commissioner when assessing an administrative penalty for a violation(s) of the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1 et seq., lists as its first factor, "[t]he seriousness of the violations;" N.J.A.C. 12:56-1.3(c), which contains factors to be considered by the Commissioner when assessing an administrative penalty for a violation(s) of the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56.a et seq., lists as its first factor, "[t]he seriousness of the violation"; and N.J.A.C. 12:60-8.3(c), which contains factors to be considered by the Commissioner when assessing an administrative penalty for a violation(s) of the New Jersey Prevailing Wage Act, N.J.S.A. 34:11-56.25 et seq., lists as its first factor, "[t]he seriousness of the violation."

As to the commenter's suggestion regarding what should be contained within the Notice of Intent, the contents of the Notice of Intent set forth at N.J.A.C. 12:8-3.1(c), like the criteria to be used when determining whether to place a person's name on the list set forth at N.J.A.C. 12:8-3.1(b) and discussed above, are taken directly from the statute; specifically, from N.J.S.A. 34:1A-1.16(e). The Department has no discretion to deviate from the statute.

Regarding the commenter's assertion that the proposed new rules should provide that a stay will be ordered on the placement of a person's name on the list in the event that that person requests a hearing in response to the Notice of Intent, is not necessary as the proposed new rules in their current form already embody the principle that a person's name will not be placed on the list after receipt of the Notice of Intent when a timely request for a hearing has been made, until the hearing has been conducted and a final administrative determination has been issued. That is, the name of a person who has received a Notice of Intent will only be placed on the list when either: (1) he or she has received the Notice of Intent and has failed to file a timely request for a hearing; (2) he or she has received the Notice of Intent and has expressly waived the right to a hearing (or has withdrawn a previously submitted request for a hearing); or (3) when a timely request for a hearing has been made after receipt of the Notice of [page=447] Intent, the hearing has been concluded, and a final administrative determination has been issued ordering placement of the person's name on the list.

Federal Standards Statement

The adopted new rules do not exceed standards or requirements imposed by Federal law as there are currently no Federal standards or requirements applicable to the subject matter of this rulemaking. As a result, a Federal standards analysis is not required.

Full text of the adopted new rules follows:

CHAPTER 8

LISTING OF PERSONS PROHIBITED FROM CONTRACTING WITH ANY PUBLIC BODY DUE TO A VIOLATION OF STATE WAGE, BENEFIT, OR TAX LAWS

SUBCHAPTER 1. GENERAL PROVISIONS

12:8-1.1 Purpose and scope

(a) The purpose of this chapter is to implement N.J.S.A. 34:1A-1.16, which empowers the Commissioner, under certain circumstances, to post to a list of persons prohibited from contracting with any public body on the Department of **Labor and Workforce Development**'s website, the name of a person found to be in violation of any

State wage, benefit, or tax laws and against whom a final order has been issued by the Commissioner, or other appropriate agency officer, for any violation of a State wage, benefit, or tax law.

(b) This chapter applies to each person covered under any one or all of the State wage, benefit, or tax laws.

SUBCHAPTER 2. DEFINITIONS

12:8-2.1 Definitions

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

"Commissioner" means the Commissioner of the Department of **Labor and Workforce Development**, or the Commissioner's duly authorized representative.

"Contracting" means any arrangement giving rise to an obligation to supply any product, or to perform any service, for a public body, other than by virtue of State employment, or to supply any product, or to perform any service, for a private person where the State provides substantial financial assistance and retains the right to approve or disapprove the nature or quality of the goods or services or the persons who may supply or perform the same.

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

"Final order" means either a final administrative determination of the Commissioner, or other appropriate agency officer, issued following adjudication of a matter as a contested case pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., or where the Department or other appropriate agency has made a finding regarding a violation of any State wage, benefit, and tax laws, or regarding the levying of a penalty pursuant to any State wage, benefit, and tax laws, has notified the violator of the finding, and the violator has expressly waived the right to a hearing by virtue of having failed to request a hearing within the appropriate time limit established by either law or rule.

"Person" means any natural person, company corporate officer or principal, firm, association, corporation, contractor, subcontractor, or other entity engaged in contracting.

"Public body" means the State of New Jersey, any of its political subdivisions, any authority created by the Legislature of the State of New Jersey, and any instrumentality or agency for the State of New Jersey, or any of its political subdivisions.

"State wage, benefit, and tax laws" means:

1. N.J.S.A. 34:11-4.1;
2. The New Jersey Prevailing Wage Act, N.J.S.A. 34:11-56.25;
3. The New Jersey State Wage and Hour Law, N.J.S.A. 34:11-56a;
4. The Workers' Compensation Law, N.J.S.A. 34:15-1;
5. The Unemployment Compensation Law, N.J.S.A. 43:21-1;
6. The Temporary Disability Benefits Law, N.J.S.A. 43:21-25;
7. N.J.S.A. 43:21-39.1; and
8. The New Jersey Gross Income Tax Act, N.J.S.A. 54A:1-1.

SUBCHAPTER 3. VIOLATIONS; PUNISHMENT; NOTICE OF INTENT

12:8-3.1 Posting of names to a list on the Department's website of persons prohibited from contracting with any public body

(a) Where a person has been found to be in violation of any State wage, benefit, or tax laws and where a final order has been issued against that person by the Commissioner, or other appropriate agency officer, for a violation of any State wage, benefit, or tax laws, the Department may post that person's name to a list on the Department's website of persons prohibited from contracting with any public body.

(b) The Commissioner shall consider the following factors as material in each decision to place a person on the list pursuant to (a) above:

1. The record of previous violations;
2. Previous placement on the list by the Commissioner;
3. The frequency of violations by the person in previous or still pending cases;
4. The significance or scale of the violations;
5. The existence of failure to pay;
6. Failure to cooperate or respond to a request to produce records, forms, documents, or proof of payments;
7. Submission of falsified or altered records, forms, documents, or proof of payments;
8. Failure to provide goods or services; and
9. Failure to comply with contract specifications.

(c) When the Department seeks to post a name to the list of persons prohibited from contracting with any public body, the Department shall, 15 business days prior to the posting, furnish the person with a written Notice of Intent indicating the following:

1. The name, email address, and telephone number of a contact person at the Department and description of the procedure for removal of the posting;
2. The specific details concerning the violations and a copy of the unsatisfied court final judgment or final order for any violation of State wage, benefit, and tax laws;
3. Notification that the person shall be prohibited from contracting with any public body if the liability is not resolved; and
4. Notification that the person can request a hearing, in writing, to the Commissioner within 20 days of receipt of the Notice of Intent to place the person on the list.

(d) The Notice of Intent to post a name to the list on the Department's website of persons prohibited from contracting with any public body shall be mailed, by regular mail, or equivalent United States Postal Service option, and return receipt requested, to the person sought to be listed by the Department.

(e) A person who receives a Notice of Intent pursuant to (c) above shall have 20 days from receipt of the Notice of Intent to request a hearing.

(f) If the person has either failed to file a timely appeal, or has expressly waived its right to appeal, the name of the person shall be posted to the list on the Department's website of persons prohibited from contracting with any public body.

(g) All hearings pursuant to this section shall be conducted in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

(h) The posting pursuant to (a) above, of the name of a person to the Department's list of persons prohibited from contracting with any public body, shall not occur when, prior to the anticipated date for posting of the name on the Department's list, either the person satisfies the entirety of the outstanding liability ordered by the court or the Commissioner, or a settlement has been reached and all payments have been made pursuant to the settlement.

(i) Within 15 days after the Department determines that a person on the Department's list of persons prohibited from contracting with a public body has satisfied the entirety of the outstanding liability ordered by the court, the Commissioner, or other agency head, or made all payments pursuant to the settlement for a violation of any State wage, benefit, or tax [page=448] laws, the Department shall remove the name of that person from the list of persons prohibited from contracting with any public body.

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