

54 N.J.R. 1771(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 > DIVISION OF WAGE AND HOUR COMPLIANCE

Administrative Code Citation

Proposed Readoption with Amendment: N.J.A.C. 12:65

Proposed New Rules: N.J.A.C. 12:65-2

Text

Construction Industry Independent Contractor Act Rules

Stop-Work Orders

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

Authority: N.J.S.A. 34:20-1 et seq., specifically, 34:20-11.

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

Proposal Number: PRN 2022-119.

Submit written comments by November 18, 2022, to:

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The agency proposal follows:

Summary

Pursuant to N.J.S.A. 52:14B-5.1.c, N.J.A.C. 12:65, Construction Industry Independent Contractor Act Rules, was scheduled to expire on August 8, 2022. As the Department of Labor and Workforce Development (Department) submitted this notice of proposal to the Office of Administrative Law prior to that date the expiration date was extended [page=1772] 180 days to February 4, 2023, pursuant to N.J.S.A. 52:14B-5.1.c(2). The Department has reviewed the rules at N.J.A.C. 12:65 and with the exception of one technical amendment to the heading of Subchapter 1 (making clear that it applies only to stop-work orders issued pursuant to N.J.S.A. 34:20-7,) and new rules at N.J.A.C. 12:65-2, which would implement P.L. 2019, c. 158, § 2, amended by P.L. 2021, c. 165, § 4 (N.J.S.A. 34:20-7.1), the Department 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. 12:65 be readopted with the amendment and new rules described below.

A summary of the sections at N.J.A.C. 12:65 follows:

N.J.A.C. 12:65-1.1 sets forth the purpose of Subchapter 1, which is to establish both the standard and procedure for the issuance by the Commissioner of the Department of Labor and Workforce Development (Commissioner) of a stop-work order and the release of same pursuant to N.J.S.A. 34:20-7c through 7f.

N.J.A.C. 12:65-1.2 sets forth the scope of Subchapter 1; that is, that the subchapter applies to each "employer," as that term is defined at N.J.A.C. 12:65-1.3.

N.J.A.C. 12:65-1.3 sets forth the definitions of words and terms used throughout the chapter.

N.J.A.C. 12:65-1.4 contains the procedure for issuance by the Commissioner of a stop-work order pursuant to N.J.S.A. 34:20-7, for a second violation of the provisions of the Act.

N.J.A.C. 12:65-1.5 contains the procedure for issuance by the Commissioner of a stop-work order pursuant to N.J.S.A. 34:20-7, for a third or subsequent violation of the provisions of the Act.

N.J.A.C. 12:65-1.6 contains the procedure and substantive requirements for release of a stop-work order by the Commissioner pursuant to N.J.S.A. 34:20-7.

N.J.A.C. 12:65-1.7 addresses the requirement pursuant to the Act that an employer, whose release from a stop-work order pursuant to N.J.S.A. 34:20-7 has been conditioned upon the two-year probationary period, must submit periodic reports to the Department during that period.

The Department is proposing new Subchapter 2, which would address both the standards and procedure for issuance by the Commissioner of a stop-work order pursuant to N.J.S.A. 34:20-7.1 (rather than N.J.S.A. 34:20-7). This section--N.J.S.A. 34:20-7.1--appears within N.J.S.A. 34:20-1 et seq., the Construction Industry Independent Contractor Act, (Act) immediately following N.J.S.A. 34:20-7; however, it establishes a power of the Commissioner to issue a stop-work order, separate and apart from the stop-work order power established pursuant to N.J.S.A. 34:20-7. The Commissioner may issue a stop-work order pursuant to N.J.S.A. 34:20-7.1 after either an initial determination as a result of an audit of a business, or an investigation pursuant to N.J.S.A. 34:20-7.1(a), that an employer is in violation of any State wage, benefit, or tax law, as that term is defined at N.J.S.A. 34:1A-1.11, or has failed to meet employer obligations at N.J.S.A. 43:21-7 or 14, or for a violation of any provision at N.J.S.A. 34:2-21.1 et seq., or 34:15C-1 et seq. The Commissioner may issue a stop-work order pursuant to N.J.S.A. 34:20-7 only for second and subsequent violations of N.J.S.A. 34:20-1 et seq. New N.J.A.C. 12:65-2 shares similarities for the issuance of a stop-work order as N.J.A.C. 12:65-1 and follows the statutory process set forth at N.J.S.A. 34:20-7.1.

The Department also proposes that the heading of Subchapter 1 be changed from "SUBCHAPTER 1. STOP-WORK ORDERS," to "SUBCHAPTER 1. STOP-WORK ORDERS--N.J.S.A. 34:20-7." This should minimize any possible confusion that might result from the existence of two separate subchapters at Chapter 65, each addressing a different stop-work order power of the Commissioner derived from two different sections of the same law--the Construction Industry Independent Contractor Act.

Finally, the Department would like to note that within new N.J.A.C. 12:65-2.3, it is including the definition of the term "employer," that appears within existing N.J.A.C. 12:65-1.3. As explained in the 2008 notice of proposal for new rules at N.J.A.C. 12:65 (40 N.J.R. 2197(a)), the only difference between the definition for the term "employer" within the Act and the definition of that term, that appears at N.J.A.C. 12:65-1.3, and proposed N.J.A.C. 12:65-2.3, is that the definition that appears in the Act does not include the word "individual," among the types of entities that may be considered an "employer," whereas the definition of the term "employer," which appears at N.J.A.C. 12:65-1.3, and proposed N.J.A.C. 12:65-2.3, does include the word "individual." As explained in the 2008 notice of proposal, other similar definitions of the term "employer," which appear within Title 34 of the New Jersey statutes (for example, N.J.S.A. 34:11-4.1 and 56a1), not to mention definitions of the term "employer," which appear elsewhere throughout the New Jersey statutes, include the word, "individual." Furthermore, as was also explained in the 2008 notice of proposal, the definition of the term "employer," which appears at N.J.S.A. 34:20-3 is the same definition that appeared in Assembly No. 4009 (the bill which later became the Act) when that bill was introduced. In other words, there is no evidence that the word "individual" was removed from the law at some point during the legislative process. Based on the foregoing, the Department assumed in 2008, as it does today, that the Legislature's failure to include that word within the definition of the term "employer" within N.J.S.A. 34:20-3 was an oversight.

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 with amendment and new rules, would have a positive social impact in that they would eliminate any possible confusion regarding the Department's implementation of the Act, as amended at P.L. 2019, c. 158 and P.L. 2021, c. 165. The rules proposed for readoption with amendment and new rules, would also have a positive social impact in that they would ensure that prior to being issued a stop-work order, an employer has been afforded the appropriate due process with regard to the underlying violations of law upon which the stop-work order is based.

Economic Impact

The rules proposed for readoption with amendment and new rules would have a positive economic impact upon workers, construction contractors, and those businesses, which engage the services of construction contractors in that the rules proposed for readoption with amendment and new rules, would clearly delineate when a stop-work order will be issued by the Commissioner pursuant to the Act. The stop-work order is a penalty with profound and far-reaching economic consequences, as opposed to, for example, the levying of administrative penalties. Whereas, the latter affects only the violator, the former impacts other workers and contractors working on a given worksite, the business entity that has engaged the services of the violator, and the public that is indirectly affected by delays in construction. It is important to all parties involved in these matters that any ambiguities present in the Act, specifically, as it applies to the issuance of stop-work orders, be cured by regulation. The clarity sought to be achieved by the rules proposed for readoption with amendment and new rules, would benefit all involved, including workers, contractors, businesses that are engaging the services of contractors, the public, and the State.

Federal Standards Statement

A Federal standards analysis is not required because the rules proposed for readoption with amendment and new rules, are not subject to any Federal standards or requirements. Specifically, the rules proposed for readoption with amendment and new rules, are governed by a State law, N.J.S.A. 34:20-1 et seq. (the Construction Industry Independent Contractor Act).

Jobs Impact

The rules proposed for readoption with amendment and new rules, would have no impact on either the generation or loss of jobs.

Agriculture Industry Impact

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

Regulatory Flexibility Analysis

The rules proposed for readoption with amendment and new rules, would primarily limit, in the manner described above in the Summary, Social Impact, and Economic Impact statements, the Commissioner's authority to issue a stop-work order pursuant to the Act. These limitations on the Commissioner, in and of themselves, do not impose any reporting, [page=1773] 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. However, within the rules proposed for readoption with amendment and new rules, is a provision allowing the Commissioner to condition the release of a stop-work order issued pursuant to N.J.S.A. 34:20-7 on the employer serving a two-year probationary period during which the employer would be required to submit to the Department quarterly payroll records. The keeping of these payroll records by employers is already required pursuant to N.J.A.C. 12:16-2.1. The rules proposed for readoption with amendment and new rules add the requirement that these records be furnished by the employer to the Department on a quarterly basis during the two-year probationary period. This requirement would affect each employer, large or small, against whom a stop-work order has been issued by the Commissioner, pursuant to N.J.S.A. 34:20-7, and for whom the Commissioner has conditioned the release of the stop-work order on the employer serving the two-year probation. Employers should not require outside professional services to comply with the rules proposed for readoption with amendment and new rules.

Housing Affordability Impact Analysis

It is not anticipated that the rules proposed for readoption with amendment and new rules would evoke a change in the average costs associated with housing or on the affordability of housing in the State. The basis for this finding is that the rules proposed for readoption with amendment and new rules pertain to the issuance of stop-work orders pursuant to the Construction Industry Independent Contractor Act and have nothing to do with housing.

Smart Growth Development Impact Analysis

It is not anticipated that the rules proposed for readoption with amendment and new rules, would not evoke a change in the housing production within Planning Areas 1 and 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 and new rules do not pertain to housing production, either within Planning Areas 1 or 2, within designated centers, or anywhere in the State of New Jersey.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The Commissioner 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 rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 12:65.

Full text of the proposed amendment and new rules follows (additions indicated in boldface **thus**):

SUBCHAPTER 1. STOP-WORK ORDERS --**N.J.S.A. 34:20-7**

SUBCHAPTER 2. STOP-WORK ORDERS--N.J.S.A. 34:20-7.1

12:65-2.1 Purpose

The purpose of this subchapter is to set forth both the standard and procedure for the issuance by the Commissioner of a stop-work order and the release of same pursuant to N.J.S.A. 34:20-7.1.

12:65-2.2 Scope

The provisions of this subchapter shall apply to each "employer," as that term is defined at N.J.S.A. 34:20-3.

12:65-2.3 Definitions

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

"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.

"Director" means the Director of the Division of Wage and Hour Compliance, or his or her designee.

"Employer" means an individual, partnership, association, joint stock company, trust, corporation, or other legal business entity or successor thereof, who is primarily engaged in the business of, or enters into, a contract for making improvements to real property and includes any subcontractor or lower tier contractor.

"State wage, benefit, and tax laws" shall mean as that term is defined at N.J.S.A. 34:1A-1.11.

12:65-2.4 Issuance of stop-work order

(a) If the Commissioner determines, after either an initial determination resulting from an audit of a business or an investigation, pursuant to N.J.S.A. 34:20-7.1(a), that an employer is in violation of any State wage, benefit, and tax laws, including, but not limited, to a violation of N.J.S.A. 34:15-79, or has failed to meet obligations as provided at N.J.S.A. 43:21-7 or 14, or for a violation of N.J.S.A. 34:2-21.1 et seq., or N.J.S.A. 34:15C-1 et seq., the Commissioner may issue a stop-work order against the employer requiring

cessation of all business operations of the employer at one or more worksites, or across all of the employer's worksites and places of business.

(b) The stop-work order issued pursuant to this subchapter may be issued only against the employer found to be in violation or in non-compliance.

(c) If a stop-work order has been issued against a subcontractor pursuant to this subchapter, the general contractor shall retain the right to terminate the subcontractor from the project.

(d) The stop-work order issued pursuant to this subchapter shall be effective when served upon the employer at the place of business or, for a particular employer worksite, when served at that worksite.

(e) The stop-work order issued pursuant to this subchapter shall remain in effect until the Commissioner issues an order releasing the stop-work order upon a finding that the employer has come into compliance and has paid any unpaid wages, contributions, taxes, penalties, and/or fees deemed to be satisfactory to the Commissioner, or after the Commissioner determines, at the conclusion of a hearing held pursuant to N.J.A.C. 12:65-2.5, that the employer did not commit the act on which the stop-work order was based.

(f) The stop-work order issued pursuant to this subchapter shall be effective against any successor entity engaged in the same or equivalent trade or activity that has one or more of the same principals or officers as the corporation, partnership, limited liability company, or sole proprietorship against which the stop-work order was issued.

12:65-2.5 Hearing and appeal

(a) An employer who is subject to a stop-work order pursuant to this subchapter may request a hearing before the Director, in writing, within 72 hours of its receipt of the stop-work order.

(b) A request for a hearing pursuant to (a) above, shall not automatically stay the effect of the stop-work order issued pursuant to this subchapter.

(c) Within seven business days of receipt of the request for a hearing, the Director shall conduct a hearing allowing the employer to contest the issuance of the stop-work order.

(d) The Director shall permit the employer to present evidence at the hearing.

(e) The Director shall issue a written determination within five business days after conclusion of the hearing, either upholding or reversing the stop-work order issued pursuant to this subchapter, including the grounds on which the decision was made.

(f) If the employer disagrees with the determination of the Director, the employer may appeal that determination to the Commissioner, in writing, within 15 days of receipt of the Director's written determination pursuant to (e) above.

(g) If the employer fails to request a hearing pursuant to this section, the stop-work order issued pursuant to this subchapter becomes a final order after expiration of the 72-hour period to request a hearing and may only be released upon a finding by the Commissioner that the employer has come into compliance and has paid any unpaid wages, contributions, taxes, penalties, and/or fees deemed to be satisfactory to the Commissioner.

[page=1774] (h) If a written determination is issued by the Director pursuant to (e) above, upholding the stop-work order issued pursuant to this subchapter, and the employer fails to appeal that determination pursuant to (f) above, the stop-work order issued pursuant to this subchapter becomes a final order after expiration of the 15-day period to file an appeal and may only be released upon a finding by the Commissioner that the employer has come into compliance and has paid any unpaid wages, contributions, taxes, penalties, and/or fees deemed to be satisfactory to the Commissioner.

(i) All appeal hearings before the Commissioner pursuant to (f) above, shall be conducted in accordance with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedures Rules, N.J.A.C. 1:1.

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