

EMERGENCY ADOPTION

LABOR AND WORKFORCE DEVELOPMENT

DIVISION OF UNEMPLOYMENT INSURANCE

Pandemic Unemployment Assistance (PUA) for Self-employed Individuals

Adopted Emergency New Rule and Concurrent Proposed New Rule: N.J.A.C.

12:17-12.8

Emergency New Rule Adopted and Concurrent Proposed New Rule Authorized: April 15, 2020, by Robert Asaro-Angelo, Commissioner, Department of Labor and Workforce Development.

Filed: April 15, 2020, as R.2020 d.058.

Gubernatorial Approval (N.J.S.A. 52:14B-4(c)): April 15, 2020.

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

Calendar Reference: See the notice introduction below for explanation of exception to calendar requirement.

Concurrent Proposal Number: PRN 2020-054.

Emergency New Rule Effective Date: April 15, 2020.

Emergency New Rule Expiration Date: June 14, 2020.

Submit written comments by June 3, 2020, to:

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This new rule was adopted on an emergency basis and became effective upon acceptance for filing by the Office of Administrative Law (see N.J.S.A. 52:14B-4(c) and N.J.A.C. 1:30-4.4). Concurrently, the provisions of this emergency new rule are being proposed for readoption in accordance with the normal rulemaking requirements contained in the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and the Rules for Agency Rulemaking, N.J.A.C. 1:30. The readopted new rule will become effective upon acceptance for filing by the Office of Administrative Law (see N.J.A.C. 1:30-4.4(d)) if filed on or before the emergency new rule's expiration date.

As this rulemaking involves an imminent peril subject to the provisions of N.J.S.A. 52:14B-4(c), it is excepted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a)3.

The emergency adoption and concurrent proposal follows:

Under the New Jersey Unemployment Compensation Law (UCL), N.J.S.A. 43:21-1 et seq., only "employment," as that term is defined at N.J.S.A. 43:21-19(i), is covered. Consequently, only those who have been separated from "employment" are eligible to receive benefits and employers are only required to make contributions to the unemployment compensation fund and State disability benefits fund on behalf of those whom they employ. Expressly excluded from coverage under the UCL are "independent contractors," as that term is defined at N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), commonly referred to as the "ABC test."

As a result of the COVID-19 pandemic, the Federal government through the Coronavirus Aid, Relief and Economic Security Act (CARES Act), created a benefit

called Pandemic Unemployment Assistance (PUA), which is separate and apart from regular unemployment compensation (in fact, one of the prerequisites for PUA eligibility is that the claimant is not eligible for or has exhausted all rights to regular unemployment compensation). Among those potentially eligible for PUA (described within the CARES Act as “covered individual[s]”) is a category of worker not covered under the UCL: independent contractors (sometimes described as “self-employed”). Emergency adopted and concurrently proposed new N.J.A.C. 12:17-12.8(a) will, for informational purposes, set forth the criteria for payment by the Department of Labor and Workforce Development (Department), to a “covered individual” of PUA under the CARES Act when that “covered individual” provides a self-certification that he or she is “self-employed.” Under subsection (b), the Department will make clear that its, (i) acceptance of an individual’s self-certification of self-employed status for the purpose of establishing PUA eligibility; and (ii) payment of PUA based on the individual’s self-certification, does not mean that the individual has met the standard for independent contractor status under the UCL’s ABC test, nor shall it foreclose the Department or any tribunal or court of competent jurisdiction from determining at any time with regard to such services that those services constitute “employment” as that term is defined at N.J.S.A. 43:21-19(i) or elsewhere.

On the whole, the emergency adopted and concurrently proposed new rule at N.J.A.C. 12:17-12.8 will permit the Department to accept an individual’s self-certification of self-employed status for the purpose of establishing that individual’s eligibility for PUA, thereby expediting payment to eligible self-employed individuals of much needed financial assistance in the form of PUA under the Federal CARES Act, without, among

other things, foreclosing the Department from meeting its statutory obligation to conduct a fact-sensitive analysis under the statutory ABC test of services performed by individuals for remuneration for the purpose of determining coverage under the UCL.

Social Impact

The emergency adopted and concurrently proposed new rule will have a positive social impact in that it will ensure prompt payment to eligible self-employed individuals of PUA under the Federal CARES Act, without jeopardizing the Department's ability to meet its statutory obligations under the UCL.

Economic Impact

The emergency adopted and concurrently proposed new rule will have a positive economic impact in that it will permit the Department to ensure that eligible self-employed individuals get their PUA as soon as possible, which will inure to the economic benefit not only of the eligible self-employed individuals, but also to the benefit of society as whole in that prompt receipt of this assistance by eligible self-employed individuals will presumably contribute to stimulating an economy hit hard by the COVID-19 pandemic. In addition, it is the Department's belief that the new rule will have a positive economic impact in that it will minimize any possible confusion as to the meaning of the Department's acceptance of an individual's self-certification of self-employed status. It is the Department's hope that minimizing confusion as to these issues will avoid costs of unnecessary litigation, which might otherwise result.

Federal Standards Statement

The emergency adopted and concurrently proposed new rule does not exceed standards or requirements imposed by Federal law. Specifically, the emergency

adopted and concurrent proposed new rule is not inconsistent with either the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301 et seq., or the Federal CARES Act, S3548, 116th Congress (2019-2020). Consequently, no Federal standards analysis is required.

Jobs Impact

It is not anticipated by the Department that the emergency adopted and concurrently proposed new rule will result in the generation or loss of jobs. Accordingly, no jobs impact analysis is required.

Agriculture Industry Impact

The Department does not anticipate that the emergency adopted and concurrently proposed new rule will have an impact on the agriculture industry.

Regulatory Flexibility Statement

The emergency adopted and concurrently proposed new rule will impose no new reporting, recordkeeping, or compliance requirements on small businesses as that term is defined within the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The emergency adopted and concurrently proposed new rule will simply permit the Department to accept an individual's self-certification of self-employed status, thereby expediting payment to eligible self-employed individuals of much needed PUA under the Federal CARES Act, without compromising the Department's ability to satisfy its statutory responsibilities under the UCL. Accordingly, a regulatory flexibility analysis is not required.

Housing Affordability Impact Analysis

The emergency adopted and concurrently proposed new rule will not evoke a change in the average costs associated with housing, nor will it affect the affordability of

housing in the State. The basis for this finding is that the emergency adopted and concurrent proposed new rule pertains only to the UCL and the Federal CARES Act, neither of which has anything to do with housing.

Smart Growth Development Impact Analysis

The emergency adopted and concurrently proposed new rule will not evoke a change in the housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the emergency adopted and concurrent proposed new rule pertains only to the NJ UCL and the Federal CARES Act. The emergency adopted and concurrent proposed new rule does 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 will 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 emergency adopted and concurrently proposed new rule follows:

SUBCHAPTER 12. CLAIMS ADJUDICATION – OTHER THAN BENEFIT ELIGIBILITY ISSUES

12:17-12.8 Pandemic Unemployment Assistance (PUA) for self-employed individuals

(a) A “covered individual” under the Pandemic Unemployment Assistance (PUA) program established by the Federal government through the Coronavirus Aid, Relief and Economic Security Act (CARES Act), S3548, 116th Congress (2019-2020), Section 2102, includes, but is not limited to, one who is not eligible for regular compensation or extended benefits under State or Federal law or Pandemic Emergency Unemployment Compensation (PEUC) under Section 2107 of the CARES Act, including an individual who has exhausted all rights to regular unemployment or extended benefits under State or Federal law or PEUC under Section 2107 of the CARES Act; and provides self-certification that the individual:

1. Is self-employed;

2. Is seeking part-time employment;

3. Does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law or PEUC under Section 2107 of the CARES Act; and

4. Is otherwise able to work and available for work within the meaning of N.J.S.A. 43:21-1 et seq., except the individual is unemployed, partially unemployed, or unable or unavailable to work because:

i. The individual has been diagnosed with COVID–19 or is experiencing symptoms of COVID–19 and seeking a medical diagnosis;

ii. A member of the individual's household has been diagnosed with COVID–19;

iii. The individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID–19;

iv. A child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID–19 public health emergency and such school or facility care is required for the individual to work;

v. The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID–19 public health emergency;

vi. The individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID–19;

vii. The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID–19 public health emergency;

viii. The individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID–19;

ix. The individual has to quit his or her job as a direct result of COVID–19;

x. The individual's place of employment is closed as a direct result of the COVID–19 public health emergency; or

xi. The individual meets any additional criteria established by the Secretary of the United States Department of Labor for unemployment assistance under Section 2102 of the CARES Act.

(b) Acceptance by the Department under (a) above of an individual's self-certification as to his or her status as self-employed, and any determination by the Department based on that self-certification that an individual is not eligible for regular compensation or

extended benefits for the sole purpose of, and as a pre-requisite to, establishing that the individual is eligible for PUA, shall not constitute a determination of the status of that individual as an independent contractor under N.J.S.A. 43:21-19(i)(6)(A), (B), and (C) (the “ABC test”), nor shall it foreclose the Department or any tribunal or court of competent jurisdiction from determining at any time with regard to such services that those services constitute “employment” as that term is defined at N.J.S.A. 43:21-19(i) or elsewhere.