

52 N.J.R. 502(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 > OFFICE OF THE COMMISSIONER

Administrative Code Citation

Proposed New Rules: N.J.A.C. 12:6

Text

Confidentiality of Complainant's or Witness' Personally Identifiable Information

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

Authority: N.J.S.A. 34:1A-3(e).

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

Proposal Number: PRN 2020-028.

A **public hearing** on the proposed new rules will be held on the following date at the following location:

Wednesday, April 8, 2020 at 9:00 A.M.

New Jersey Department of Labor and Workforce Development

John Fitch Plaza

2nd Floor Conference Room

Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 777-2960, if you wish to be included on the list of speakers.

Submit written comments by May 15, 2020, to:

David Fish, Executive Director

Legal and Regulatory Services

NJ Department of Labor and Workforce Development

PO Box 110-13th Floor

Trenton, New Jersey 08625-0110

david.fish@dol.nj.gov

The agency proposal follows:

Summary

The Department of Labor and Workforce Development (Department) is proposing new rules at N.J.A.C. 12:6 in order to ensure that, except under certain limited circumstances, the personally identifiable information (PII) of any individual who files a complaint with the Department under any statute enforced by the Department or under any chapter of Title 12, of the New Jersey Administrative Code, will be kept [page=503] confidential by the Department and will not be disclosed; and to ensure that, except under certain limited circumstances, the PII of any witness who has provided a statement to the Department, as part of a Department investigation, to determine whether a violation of any statute enforced by the Department or of any chapter of Title 12 of the New Jersey Administrative Code has occurred, will be kept confidential by the Department and will not be disclosed. The limited circumstances set forth within the proposed new rules where disclosure by the Department of the PII of a complainant or the PII of a cooperating witness would be permitted are: (1) when such disclosure is deemed necessary by the Department for the purpose of administering any statute enforced by the Department or any chapter of Title 12 of the New Jersey Administrative Code, including when such disclosure is deemed necessary by the Department to conduct its investigation into whether a violation of statute or of any chapter of Title 12 of the New Jersey Administrative Code has occurred; (2) to officers or employees of an agency of the Federal government or a State or local government, if such a disclosure would not impede the enforcement of, and are not inconsistent with the purposes of, any statute enforced by the Department or any chapter of Title 12 of the New Jersey Administrative Code, provided that: i. the agency of the Federal government or a State or local government requesting the information is not the entity against which the complaint was filed; ii. requests by law enforcement agents are made in writing, the PII of the requestor has been verified prior to the release of information by showing of a badge, warrant, written and signed request on agency letterhead, or some other similar indication of official purpose, and the law enforcement agent has certified in writing that the confidentiality of the disclosed information will be maintained; and iii. public officials establish that the

information requested is to be used in furtherance of their public duties and have certified in writing on agency letterhead that the confidentiality of the disclosed information will be maintained; and (3) when such disclosure has been ordered by a court or tribunal of competent jurisdiction.

The Department firmly believes that disclosing the identities of complainants or witnesses contained within government records of the Department, whether that disclosure occurs before, during, or after completion of a Department investigation, has a chilling effect on the filing of complaints and the cooperation of witnesses under the statutes and rules the Department is empowered to enforce. In other words, the Department believes that a complainant whose PII is protected from disclosure is far more likely to exercise his or her rights under the Department's statutes and rules, as is a witness far more likely to provide a statement to Department investigators when that witness is assured by rule that his or her PII is protected from disclosure. The willingness of individuals to file complaints with the Department, and of witnesses to provide statements to Department investigators, is essential to the Department's enforcement efforts and to the Department's achievement of its statutory charge.

Many, if not all, of the statutes and rules the Department is tasked with enforcing protect the safety and well-being of workers. Where a complainant or a cooperating witness is an employee and the complaint filed with the Department is against the individual's employer, it is especially important that the complainant or cooperating witness not fear that his or her PII will be disclosed to the employer and that the Department be empowered by rule to assure the individual that his or her PII will never be disclosed. Where the PII of an employee/complainant or employee/witness is disclosed to the employer, the employer may retaliate against the employee, either in order to pressure the employee and thereby impede the Department's investigation or to punish the employee and deter other employees from filing future complaints or cooperating with future Department investigations. Even where the complainant or cooperating witness is not an employee, disclosure by the Department of the individual's PII would have a serious chilling effect, especially in this era of the internet, social media, and search engines, where with the click of a button the fact of that individual having filed a complaint with the Department or that witness having provided a statement to Department investigators could be broadcast to the world and thereby used to interfere with that individual's current and/or future employment or to intimidate that individual and others from exercising their rights under the laws and rules enforced by the Department. To allow such disclosures to occur with their attendant chilling effect would be inimical to the public interest.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirement of N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed new rules would have a positive social impact in that they would result in more effective enforcement by the Department of its laws and rules, thereby protecting the well-being and safety of workers, while also ensuring a level playing field for law-abiding employers. The former is an obvious social benefit of improved labor law enforcement; however, the latter impact is sometimes overlooked. That is, although it is sometimes assumed that businesses should oppose measures such as those proposed in this notice, the reality is that the overwhelming majority of businesses and their owners are law-abiding and all too often must operate at a competitive disadvantage to those who cut corners, exploit workers, and break the law. Protecting the identities of complainants and cooperating witnesses will benefit all workers and all law-abiding employers. The only parties that would suffer from the proposed new rules are those employers who are accused of breaking the law and who might seek to use the identities of complainants and cooperating witnesses to intimidate those individuals and others, thereby potentially impeding Department investigations and deterring future cooperation with Departmental enforcement efforts.

Economic Impact

Relative to employee/complainants and employee/witnesses, the proposed new rules would have a positive economic impact in that the jobs of workers who inform the Department of violations would be protected. The benefit to employers in the confidentiality of employee/complainant and employee/witness identities would be removing the regrettable temptation of retaliatory action by employers against employees who informed the Department of possible violations. The proposed new rules would benefit employers economically by avoiding retaliatory actions against now

undisclosed confidential employee/complainants and employee/witnesses, thus reducing the employer's expense of defending lawsuits by workers who were subjected to retaliation. The proposed new rules would benefit workers by improving the ability of the Department to gather probative and persuasive evidence of violations in the Department's investigations, bolstering the strength of the Department's cases being prepared for hearings, resulting in better recoveries for workers and improved working conditions going forward.

With regard to non-employee complainants and witnesses, the economic impact of the proposed new rules would be less direct. Those individuals may not stand to gain financially (for example, through the payment of back wages) from the Department's investigation of a particular labor law/rule violation. However, the State's labor laws and rules are designed to protect the well-being and safety, financially and otherwise, of all workers and all workers' families throughout the State, and to the degree that non-employee complainants and witnesses are empowered to file complaints and cooperate as witnesses without fear of retribution, it is anticipated that more such complaints will be filed and more such witnesses will cooperate with Department investigations, thereby inuring to the benefit economically of all of those (workers and their families) who exist under the protective umbrella of the State's labor laws and rules.

Federal Standards Statement

A Federal standards analysis is not required because the proposed new rules are not subject to any Federal standards or requirements. Specifically, the proposed new rules are governed by State statutes. It is under these State statutes that the Department receives and investigates complaints and interviews witnesses to alleged violations. It is exclusively as a matter of State law and not Federal law or standards that the Department seeks to protect the PII of such complainants and witnesses who are often central to the Department's enforcement efforts. Accordingly, no Federal standards analysis is required.

[page=504] Jobs Impact

It is not anticipated by the Department that the proposed new rules will result in the generation or loss of jobs.

Agriculture Industry Impact

The Department does not anticipate that the proposed new rules would have an impact on the agriculture industry.

Regulatory Flexibility Analysis

The proposed new rules would 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 proposed new rules would simply protect from disclosure by the Department of the identities of complainants and cooperating witnesses. Accordingly, a regulatory flexibility analysis is not required.

Housing Affordability Impact Analysis

The proposed new rules would not evoke a change in the average costs associated with housing. The proposed new rules pertain only to the confidentiality of the identities of complainants and witnesses in Department investigations. The proposed new rules do not affect the affordability of housing.

Smart Growth Development Impact Analysis

The proposed new rules would not evoke a change in housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The proposed new rules pertain only to the confidentiality of the identities of complainants and witnesses in Department investigations. The proposed new rules do not pertain to housing production, either within Planning Areas 1 or 2, or within designated centers, or anywhere in the State of New Jersey.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

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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 proposed new rules follows:

CHAPTER 6

CONFIDENTIALITY

SUBCHAPTER 1. CONFIDENTIALITY OF COMPLAINANT'S OR WITNESS' PERSONALLY IDENTIFIABLE INFORMATION

12:6-1.1 Purpose and scope

(a) The purpose of this subchapter is to ensure that, except under certain limited circumstances (enumerated at N.J.A.C. 12:6-1.4), the PII of any individual who files a complaint with the Department under any statute enforced by the Department, or under any chapter of Title 12 of the New Jersey Administrative Code, shall be kept confidential by the Department and shall not be disclosed; and to ensure that, except under certain limited circumstances (enumerated at N.J.A.C. 12:6-1.4), the PII of any witness who has provided a statement to the Department, as part of a Department investigation, to determine whether a violation of any statute enforced by the Department or of any chapter of Title 12 of the New Jersey Administrative Code has occurred, shall be kept confidential by the Department and shall not be disclosed.

(b) The provisions of this chapter shall apply to each government record of the Department and to each request for access to a government record of the Department.

12:6-1.2 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 his or her authorized representative.

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

"Government record" means "government record," as that term is defined at N.J.S.A. 47:1A-1.1.

"Personally identifiable information" or "PII" means information that can be used to distinguish or trace an individual's identity, either alone or when combined with other personal or identifying information that is linked or linkable to a specific individual, including, but not limited to, first and last name, Social Security number, home and work address, home and work phone number, and home and work email address. The definition of PII is not anchored to any single category of information or technology. PII requires a case-by-case assessment of the specific risk that an individual can be identified.

12:6-1.3 Disclosure of complainant or witness PII; general prohibition

(a) The PII of any individual who files a complaint with the Department under any statute enforced by the Department, or under any chapter of Title 12 of the New Jersey Administrative Code, shall be kept confidential by the Department and shall not be disclosed, except as authorized by the Commissioner under N.J.A.C. 12:6-1.4.

(b) The PII of any witness who has provided a statement to the Department, as part of a Department investigation to determine whether a violation of any statute enforced by the Department or of any chapter of Title 12 of the New Jersey Administrative Code has occurred, shall be kept confidential by the Department and shall not be disclosed, except as authorized by the Commissioner under N.J.A.C. 12:6-1.4.

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12:6-1.4 Authorized disclosure of complainant or witness PII

(a) Under the following circumstances, the Department shall be permitted to disclose information otherwise prohibited from disclosure pursuant to N.J.A.C. 12:6-1.3(a) or (b):

1. When such disclosure is deemed necessary by the Department for the purpose of administering any statute enforced by the Department, or any chapter of Title 12 of the New Jersey Administrative Code, including when such disclosure is deemed necessary by the Department to conduct its investigation into whether a violation of statute, or of any chapter of Title 12 of the New Jersey Administrative Code, has occurred;

2. To officers or employees of an agency of the Federal government, or a State or local government, if such a disclosure would not impede the enforcement of, and are not inconsistent with the purposes of, any statute enforced by the Department or any chapter of Title 12 of the New Jersey Administrative Code, provided the following:

i. The agency of the Federal government or a State or local government requesting the information is not the entity against which the complaint was filed;

ii. Requests by law enforcement agents shall be made in writing, the identity of the requestor shall be verified prior to the release of information by the showing of a badge, warrant, written and signed request on agency letterhead, or some other similar indication of official purpose, and the law enforcement agent certifies in writing that the confidentiality of the disclosed information shall be maintained; and

iii. Public officials shall establish that the information requested is to be used in furtherance of their public duties and shall certify in writing on agency letterhead that the confidentiality of the disclosed information shall be maintained.

3. When such disclosure has been ordered by a court or tribunal of competent jurisdiction.

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