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RULE ADOPTIONS

Reporter

53 N.J.R. 534(a)

NJ - New Jersey Register > 2021 > APRIL > APRIL 5, 2021 > RULE ADOPTIONS > LABOR AND WORKFORCE DEVELOPMENT -- DIVISION OF WAGE AND HOUR COMPLIANCE

Agency

LABOR AND WORKFORCE DEVELOPMENT > DIVISION OF WAGE AND HOUR COMPLIANCE

Administrative Code Citation

Adopted New Rules: N.J.A.C. 12:71

Text

New Jersey Call Center Jobs Act Rules

Proposed: September 8, 2020, at 52 N.J.R. 1661(a).

Adopted: March 8, 2021, by Robert Asaro-Angelo, Commissioner, Department of Labor and Workforce Development.

Filed: March 8, 2021, as R.2021 d.030, **with a non-substantial change** not requiring additional public notice or comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 34:1A-3.e and 34:21-15.

Effective Date: April 5, 2021.

Expiration Date: April 5, 2028.

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 with a single non-substantive change not requiring additional public notice or comment. The change on adoption is discussed in detail below.

Summary of Public Comments and Agency Responses:

Written comments were submitted by the following individuals.

1. Anthony Bawidamann, Senior Director, Government Affairs, Comcast (No address provided).
2. Hilary Chebra, Manager, Government Affairs, Chamber of Commerce Southern New Jersey (No address provided).
3. Chrissy Buteas, Chief Government Affairs Officer, New Jersey Business and Industry Association, Trenton, NJ.
4. Michael Krawitz, General Counsel, Conduent, Florham Park, NJ.

1. COMMENT: The commenters assert that the New Jersey Call Center Jobs Act (the Act), P.L. 2019, c. 470, was intended to apply only to call centers with a physical operation or shared work location within the State of New Jersey. The introductory sentence of subsection a., of section 3 of the Act, indicates that the requirement to notify the Department in the event call center staffing levels fall below a certain benchmark, applies only to an "employer with a call center within the State of New Jersey." Subsection b., of section 3 of the Act, imposes a notification requirement when an employer relocates a call center, or transfers one or more facilities or operating units comprising at least 20 percent of a call center's total operating volume of telephone calls, emails, or other electronic communications when measured against the previous 12-month average volume of those operations, "from the State of New Jersey to one or more foreign countries." The commenters warn that unnecessary confusion will result among the regulated community and among those individuals whose jobs are sought to be protected by the Act if the Department fails to provide clarity within the regulatory definition of the term "call center" at N.J.A.C. 12:71-1.2, that would reconcile that definition with what appears throughout the remaining body of the Act (cited above) and the Department's implementing rules. Consequently, the commenters suggest that the definition of the term "call center" at proposed N.J.A.C. 12:71-1.2, which states that a call center is "a facility or other operation whereby workers receive telephone calls or emails or other electronic communication for the purpose of providing customer assistance or other services," should be augmented to include the following sentence: "A call center operation means a physical operation or shared work location." The commenters suggest that with this change it will be understood that individuals who live in New Jersey and used to work at a call center in Pennsylvania, but who were transitioned to work remotely from home during the pandemic, are not, under the Act, considered employees of a New Jersey call center. Conversely, of course, with the clarification sought by the commenters, individuals who live in Pennsylvania and who used to commute to work at a call center in New Jersey, but who were transitioned to work remotely from home during the pandemic will under the Act be considered employees of the New Jersey call center. The commenters also cite to complications that could arise for multistate companies that route customer calls based on subject matter and not geographic proximity, if the definition of "call center," at proposed N.J.A.C. 12:71-1.2 is not changed in the manner suggested; that is, adding the sentence, "A call center operation means a physical operation or shared work location."

RESPONSE: The Department agrees that adding the sentence, "A call center operation means a physical operation or shared work location," to the regulatory definition of the term "call center," is consistent with the Act and will provide necessary clarity. Consequently, the Department is making the requested change on adoption. The change on adoption does not enlarge or curtail either the scope of the proposed new rules or those who will be affected by the new rules. Therefore, the Department believes that this modification is appropriate on adoption.

2. COMMENT: The commenter takes issue with the method set forth within proposed N.J.A.C. 12:71-2.1 for calculating the statutorily prescribed "staffing level capable of handling no less than 65 percent of customer volume of telephone calls, emails or other electronic communications, when measured against the previous six-month average volume of those operations, originating in the State of New Jersey or an account with a service address within the State of New Jersey." Specifically, the commenter challenges the calculation's presumption, as described in the notice of proposal (52 N.J.R. 1661(a)), that the average monthly staffing level during the immediately preceding six-month period was, in fact, the staffing level "capable of handling" 100 percent of the call volume during that six-month period. The commenter explains:

53 N.J.R. 534(a)

If the staffing level was more than was needed, then the 65 percent that the DOL calculates will in fact be more than the actual 65 percent that is needed. The issue with this is that a call center might reduce staff to a point where they are meeting 65 percent of the volume, but the DOL's calculation will say otherwise. In this scenario, DOL will effectively be mandating that a call center hire more workers than it needs to abide by the rules.

[Conversely,] If the staffing level over the six-month period was already insufficient to meet the caller volume, then the 65 percent that the DOL calculates will be lower than the actual 65 percent making the calculation.

RESPONSE: Among the most important qualities of a rule is that it be easily understood and applied by both the regulated community, who are seeking to comply, and by Department employees, who are tasked with enforcement. The Department believes that the method of calculation set forth at proposed N.J.A.C. 12:71-2.1 provides a discrete, quantifiable, measurement upon which affected employers can base their business planning, and upon which Department employees can base their investigations and potential enforcement actions. The commenter suggests that the presumption described in the notice of proposal (that the average monthly staffing level during the comparator period was, in fact, the staffing level "capable of handling" 100 percent of the call volume during that period) may result in inaccurate calculations; for example, when the staffing level in the comparator period was "more than was needed," or when it was, conversely, "already insufficient to meet the caller volume." However, a calculation rooted in a subjective judgment, such as suggested by the commenter, would be inherently problematic. That is, how is a Departmental field investigator within the Department's Division of Wage and Hour Compliance, going to determine with any degree of precision what percentage of call volume the staff in the comparator period (previous six months) was "capable of handling?" In light of the foregoing, the Department devised a method of calculation that is objective (rather than subjective); quantifiable; and, perhaps, most importantly, predictable, thereby permitting affected employers to plan for compliance. The Department will make no change to N.J.A.C. 12:71-2.1 on adoption.

3. COMMENT: Regarding proposed Subchapters 3 and 4, which address the assessment of penalties and the placement on a list of employers that provide notification under N.J.A.C. 12:71-2.2 and those who, following investigation by the Department, are determined to have [page=535] violated the notification requirement (where placement on the list results in ineligibility to receive financial assistance from the State), the commenter states the following:

Subchapters 3 and 4 both grant the Commissioner of the Department of Labor and Workforce Development broad and vague power in determining "the appropriate penalty" and "the appropriate period that the employer will remain on the list," respectively. Specifically, the rules allow the Commissioner to consider "any other factors that the Commissioner deems appropriate." While it makes sense that the Commissioner should be able to look at things on a case-by-case basis, it also seems like this could create inconsistencies in the review of different cases and how their penalties are determined.

RESPONSE: The factors set forth at Subchapters 3 and 4 of the proposed new rules to be considered by the Commissioner in exercising his or her discretion to determine "the appropriate penalty" and "the appropriate period that the employer will remain on the list," respectively, are modeled on existing factors set forth elsewhere within the Department's rules for use in determining the appropriateness of administrative penalties and length of suspension under laws enforced by the Department's Division of Wage and Hour Compliance (DWHC). Specifically, they were modeled on the factors set forth at N.J.A.C. 12:55-1.6(c) (rules for enforcement by the DWHC of the New Jersey Wage Payment Law); 12:56-1.3(c) (rules for enforcement by the DWHC of the New Jersey Wage and Hour Law); 12:60-8.3(c) (rules for enforcement by the DWHC of the New Jersey Prevailing Wage Act); 12:66-4.2 (rules for enforcement by the DWHC of the New Jersey law requiring payment of prevailing wage on construction work in public utilities); 12:67-1.4(c) (rules for enforcement by DWHC of New Jersey law prohibiting discrimination against unemployed individuals); 12:68-1.5 (rules for enforcement by DWHC of New Jersey's Opportunity to Compete Act); 12:69-1.3(c) (rules for enforcement by DWHC of New Jersey's Earned Sick Leave Law); and 12:4-3.2(b) (regarding appropriate length of license suspension for second violation of wage, benefit or tax laws). Each of these existing rules includes among the factors to be considered, something akin to, "any other factors which the Commissioner deems appropriate."

4. COMMENT: The commenter makes the following suggestions:

1. Within proposed N.J.A.C. 12:71-1.2 (Definitions), (a) the word "center," in "Call center," should be capitalized, (b) the word, "workers," within the definition of "Call center," should be replaced by "employees," (c) an "(s)" should be placed at the end of the word, "employee," (d) the term, "business entity" should be defined, (e) the term "foreign countries," should be defined, and (f) the term "full-time," which is defined in the proposed rules to mean, "working an average of 30 or more hours per week," should be defined to mean, "30 or more hours per week during the same six-month time period used in Subchapter 2 to calculate the maintenance of call center staffing levels;"

2. Throughout the proposed new rules, the word "employee," should be capitalized;

3. Throughout the proposed new rules, the term "call center," should be capitalized;

4. Throughout the proposed new rules, the term "business entity," should be capitalized;

5. Within proposed N.J.A.C. 12:71-2.2, where the employer is required to notify the Commissioner on the fifth business day following the then-current six-month period when the staffing level of a call center falls below the required amount, the employer should be required to provide notice on the 40th business day following the then-current six-month period;

6. Within proposed N.J.A.C. 12:71-2.2, where the employer is required to notify the Commissioner at least 90 days prior to the relocation or transfer of operations, the employer should be required to notify the Commissioner at least 30 days prior to the relocation or transfer of operations;

7. Within proposed N.J.A.C. 12:71-3.1, additional factors should be added to the list of factors considered when determining the appropriateness of the penalty to be assessed, including unforeseeable business circumstances, such as the loss of a major contract, a strike by a major supplier, or an unanticipated and drastic economic downturn in the local or national economy;

8. Within proposed N.J.A.C. 12:71-4.1, the Department should not "lump together" an employer that voluntarily complied with the notification requirement and an employer that violated the notification requirement;

9. Within proposed N.J.A.C. 12:71-5.1, the Department should change the time within which to request a hearing from "within 10 business days," to "within 60 calendar days" from the date of receipt of the notice;

10. Within proposed N.J.A.C. 12:71-6.1, the Department should capitalize the term, "qualified business";

11. With regard to proposed N.J.A.C. 12:71-6.1, it "fail[s] to carry out the intent of the legislation [P.L. 2019, c. 470]," adding the following:

The incentive must be substantial in order to create a meaningful incentive for vendors to employ New Jersey residents at the higher New Jersey labor rates rather than the residents of lower cost States. Therefore, a regulation that results in a very small incentive will have no impact on vendor behavior. To fulfill the policy and purpose of the underlying statute of providing a meaningful incentive to promote call center employment in New Jersey, a minimum preference of five percent should be provided to eligible bidders. [F]or purposes of clarifying whether a bidder is a qualified business, it is recommended that language be added that requires the New Jersey call center footprint of the bidder to include that of its parents, affiliates and subsidiaries, be substantial. To be meaningful, that footprint should be at least 500 employees who are in New Jersey (including remote workers located in New Jersey).

RESPONSE: With regard to suggestions 1, 2, 3, 4, and 10, the Department disagrees that any of the changes suggested are necessary and declines to make them on adoption.

With regard to suggestion 5, N.J.S.A. 34:21-10a, states that, "[i]f the staffing level of a call center falls below the amount required pursuant to this subsection, the employer shall notify the commissioner **immediately**" (emphasis added). Under the circumstances, the proposed regulatory requirement that notification occur within five business

53 N.J.R. 534(a)

days of the end of the then-current six-month period is appropriate; whereas requiring notification on the 40th business day following the end of the then-current six-month period is not.

With regard to suggestion 6, N.J.S.A. 34:21-10b, expressly states that the subject notification shall occur "at least 90 days prior to the relocation or transfer of operations." The Department has no discretion to deviate from this statutory mandate.

With regard to suggestion 7, the change suggested by the commenter is unnecessary, since the proposed new rule already contains the following factor: "Any other factors that the Commissioner deems to be appropriate in determining the penalty assessed."

With regard to suggestion 8, the Department disagrees with the commenter's assertion that the Department has chosen to "lump together" two categories of employers on the list. The Act calls for the creation of a single list. Under the Act, any employer who is included on the list shall be ineligible to receive any direct or indirect State grant, guaranteed loan, tax benefit, or any other financial support. The Act requires that those who provide the required notice be placed on the list, but does not expressly state that violators are to be included on the list. As explained in the notice of proposal, the Department determined that it would be illogical to include those who have adhered to the notification requirement on the list, but not include those who have triggered the notification requirement and who have also failed to adhere to the Act's notification requirement. Thus, the new rules require both categories of employer to be placed on the list. However, the new rules afford the Commissioner the discretion to place an employer on the list for a period of time determined to be appropriate by the Commissioner, not to exceed 36 months, and includes among the factors to be considered by the Commissioner in determining the appropriate length of time that an employer will remain on the list, "whether the employer voluntarily provided the required notification, versus having been determined, following an investigation, to have violated the notification requirement." Therefore, it is anticipated that those who have triggered and adhered to the notification requirement will [page=536] generally be placed on the list for a shorter period of time than those who have triggered, but failed to adhere to the notification requirement.

With regard to suggestion 9, the requirement that a request for hearing be filed within 10 business days is consistent with appeal timeframes found elsewhere throughout Title 12 of the New Jersey Administrative Code (N.J.A.C.) and throughout the entirety of the N.J.A.C. Providing 60 days to request a hearing would be highly unusual.

With regard to suggestion 11, the Department disagrees with each of the commenter's assertions and believes that N.J.A.C. 12:71-6.1, regarding preference for awarding a contract, is both appropriate and consistent with the intent of P.L. 2019, c. 470. Therefore, the Department declines to make any of the changes to N.J.A.C. 12:71-6.1 suggested by the commenter.

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 (addition to proposal indicated in boldface with asterisks ***thus***):

CHAPTER 71

NEW JERSEY CALL CENTER JOBS ACT RULES

SUBCHAPTER 1. GENERAL PROVISIONS

12:71-1.1 Purpose and scope

(a) The purpose of this chapter is to effectuate P.L. 2019, c. 470, known as the New Jersey Call Center Jobs Act.

53 N.J.R. 534(a)

(b) This chapter shall apply to each employer with a call center in New Jersey.

12:71-1.2 Definitions

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

"Act" means P.L. 2019, c. 470 (N.J.S.A. 34:21-8 through 15).

"Call center" means a facility or other operation whereby workers receive telephone calls or emails or other electronic communication for the purpose of providing customer assistance or other services. ***A call center operation means a physical operation or shared work location.***

"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.

"Employee" means "employee," as that term is defined at N.J.S.A. 34:11-4.1.

"Employer" means any business entity that, for the purpose of staffing a call center, employs 50 or more full-time employees in New Jersey for each working day during each of 20 or more calendar workweeks in the then-current, or immediately preceding, calendar year, or that for the purpose of staffing a call center, employs 50 or more employees in New Jersey for each working day during each of 20 or more calendar workweeks in the then-current, or immediately preceding, calendar year, who in the aggregate (that is, who collectively) work at least 1,500 hours, excluding overtime hours, in each such workweek. The 50-employee count for the purpose of defining "employer" does not include an individual who is employed principally for a purpose other than the staffing of a call center (for example, someone who works in the employer's accounting or human resources offices) and who has, during a period of unanticipated high customer volume of telephone calls, emails, or other electronic communication, been assigned for a limited duration to assist with call center functions.

"Full-time" means working an average of 30 or more hours per week.

12:71-1.3 Independent contractor status

The criteria identified in the Unemployment Compensation Law at N.J.S.A. 43:21-19(i)(6)(A), (B), and (C), commonly referred to as the "ABC test," and the case law interpreting and applying the ABC test to potential employment relationships shall be used to determine whether an individual is an employee or an independent contractor under the Act and this chapter.

SUBCHAPTER 2. CALL CENTER STAFFING; RELOCATION OR TRANSFER; NOTIFICATION

12:71-2.1 Maintenance of call center staffing level

(a) Each employer with a call center in New Jersey must maintain a staffing level capable of handling no less than 65 percent of customer volume of telephone calls, emails, or other electronic communications originating in New Jersey or an account with a service address in New Jersey, when measured against the previous six-month average volume of those operations.

(b) The following method shall be used to determine compliance with the requirement at (a) above:

1. First, calculate the average monthly staffing level (in hours worked) necessary to handle 100 percent of customer volume of telephone calls, emails, or other electronic communications originating in New Jersey or an account with a service address in New Jersey over the immediately preceding six-month period, by doing the following:

i. Tabulate the total hours worked for each of the six months during the six-month period;

53 N.J.R. 534(a)

ii. Array each of the six monthly hours worked totals from lowest to highest;

iii. Discard the highest number and the lowest number; and

iv. Add the remaining monthly hours worked totals together and divide the sum by four.

2. Second, multiply 0.65 by the number arrived at in (b)1iv above, and round the resulting number to the nearest integer.

3. The number arrived at in (b)2 above is the minimum average monthly staffing level (in hours worked) that the employer must maintain during the then-current six-month period.

i. The "then-current six-month period" is not a rolling six-month period; the measurement against the immediately preceding six-month period does not occur on a monthly basis, but rather, occurs semiannually.

ii. For an employer that qualifies as of the July 1, 2020, effective date of the Act as an "employer" with a call center in New Jersey, the first measurement under the Act and this chapter will be of the average monthly staffing level during the six-month period from July 1, 2020 to December 31, 2020, against the average monthly staffing level during the immediately preceding six-month period from January 1, 2020 to June 30, 2020.

iii. For an employer that qualifies as an "employer" with a call center in New Jersey after the July 1, 2020, effective date of the Act, the first measurement under the Act and this chapter will be of the average monthly staffing level during the six-month period beginning on the first day of the month in which the employer qualifies as an "employer" with a call center in New Jersey (due either to the start of its business or having for the first time exceeded the employee threshold for "employer"), against the average monthly staffing level during the immediately preceding six-month period.

iv. The average staffing level during the then-current six-month period will be calculated in the manner set forth at (b)1i, ii, iii, and iv above.

12:71-2.2 Notification

(a) When the staffing level of a call center falls below the amount required at N.J.A.C. 12:71-2.1, the employer shall, before the close of business on the fifth business day following the then-current six-month period, provide notice to the Commissioner using the form made available to employers on the Department's website.

(b) Any employer that relocates a call center or transfers one or more facilities or operating units comprising at least 20 percent of a call center's total operating volume of telephone calls, emails, or other electronic communications when measured against the previous 12-month average volume of those operations, from New Jersey to one or more foreign countries shall notify the Commissioner at least 90 days prior to the relocation or transfer of operations using the form made available to employers on the Department's website.

[page=537] SUBCHAPTER 3. VIOLATIONS; PENALTIES

12:71-3.1 Administrative penalties

(a) When the Commissioner finds that an employer has violated the notification requirements set forth at N.J.A.C. 12:71-2.2, the Commissioner is authorized to assess and collect administrative penalties in an amount not to exceed \$ 7,500 for each day the employer fails to provide the notification.

(b) No administrative penalty shall be levied under this subchapter, unless the Commissioner provides the alleged violator with notification of the violation and the amount of the penalty and an opportunity to request a formal hearing pursuant to N.J.A.C. 12:71-5.1.

(c) All penalties shall be paid within 30 days of the date of the final order. Failure to pay such penalties shall result in a judgment being obtained in a court of competent jurisdiction.

53 N.J.R. 534(a)

(d) All payments shall be made to the "Commissioner of Labor and Workforce Development." All payments shall be made by certified check or money order, or payable in a form suitable to the Commissioner.

(e) In assessing an administrative penalty under this subchapter, the Commissioner shall consider the following factors, where applicable, in determining what constitutes an appropriate penalty for the particular violation.

1. The seriousness of the violation;
2. The past history of previous violations by the employer;
3. The good faith of the employer;
4. The size of the employer's business; and
5. Any other factors that the Commissioner deems to be appropriate in determining the penalty assessed.

SUBCHAPTER 4. LIST OF EMPLOYERS PROVIDING NOTIFICATION

12:71-4.1 List of employers providing notification

(a) The Commissioner shall compile and maintain a list and shall update that list on a monthly basis, of all employers that provide notification pursuant to N.J.A.C. 12:71-2.2 and of those employers who, following investigation by the Department, are determined to have violated the notification requirement under the Act (that is, the employer should have, but did not, provide the required notification).

(b) An employer who is placed on the list at (a) above shall remain on that list for a period of time determined to be appropriate by the Commissioner, not to exceed 36 months.

(c) In determining the appropriate period of time that the employer will remain on the list, the Commissioner shall consider the following factors, where applicable.

1. Whether the employer voluntarily provided the required notification, versus having been determined, following an investigation, to have violated the notification requirement;
2. The past history of previous violations by the employer;
3. The good faith of the employer; and
4. Any other factors that the Commissioner deems to be appropriate in determining the sanction imposed.

(d) No employer shall be placed on the list at (a) above, unless the Commissioner provides the employer with notification of intent to place the employer on the list, the period of time that the Commissioner intends to maintain the employer's name on the list, and an opportunity to request a formal hearing pursuant to N.J.A.C. 12:71-5.1.

(e) The Commissioner shall make the list of employers at (a) above available to the public and prominently display a link to the list on the Department's website.

12:71-4.2 Ineligibility to receive financial assistance from the State

(a) An employer who is included on the list at N.J.A.C. 12:71-4.1 shall be ineligible to receive any direct or indirect State grant, guaranteed loan, tax benefit, or any other financial support for the period of time that the employer is on the list, except that the employer's inclusion on the list shall not prevent the employer from receiving any grant to provide training or other employment assistance to individuals who are members of specific groups selected as being in particular need of training or other employment assistance, including, but not limited to, employees of the employer whose employment is being affected due to the transfer or relocation of the employer's facility or operating unit, veterans, minority groups, and women.

53 N.J.R. 534(a)

(b) For the purpose of this section, the term "tax benefit" shall mean a tax advantage awarded by a State governmental entity that has the effect of reducing a taxpayer's liability under the New Jersey Gross Income Tax Act, N.J.S.A. 54A:1-1 et seq., or 54:10A-5.

SUBCHAPTER 5. APPEALS

12:71-5.1 Appeals

(a) Whenever the Department shall find cause to place an employer on the list pursuant to N.J.A.C. 12:71-4.1, or to impose an administrative penalty pursuant to N.J.A.C. 12:71-3.1, it shall notify the employer in writing of the reason for the action taken and provide the opportunity for a hearing 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.

(b) All requests for hearing shall be filed within 10 business days from the date of receipt of the notice. The Commissioner, or his or her designee, shall issue the final decision in accordance with the applicable provisions of the Administrative Procedure Act and Uniform Administrative Procedure Rules.

1. All requests for a hearing shall be in writing and shall be directed to the following address:

NJ Department of Labor and Workforce Development
Division of Wage and Hour Compliance
PO Box 389
3rd Floor
Trenton, NJ 08625-0389
or

WageHour@dol.nj.gov

(c) In the absence of a timely request for a hearing, pursuant to (b) above, the determination of the Department shall be deemed the final administrative action in the given matter.

(d) All requests for a hearing shall be reviewed by the Division of Wage and Hour Compliance in order to determine whether the dispute can be resolved at an informal settlement conference. If the review indicates that an informal settlement conference is warranted, such conference shall be scheduled. If a settlement cannot be reached, the case shall be forwarded to the Office of Administrative law for a formal hearing.

SUBCHAPTER 6. PREFERENCE FOR MAKING/AWARDING CONTRACT

12:71-6.1 Preference for making/awarding contract

(a) In making or awarding any contract for call center services, where the call center services contracted for are not ancillary to the delivery of another service or good, a State department or agency making or awarding the contract shall give a preference to any qualified business submitting a proposal in response to the advertised solicitation or the request for quotes. For the purpose of evaluating "price and other factors," the preference given to a qualified business shall be one of the following:

1. An amount or price not to exceed 10 percent; or
2. A point allocation not to exceed 10 percent.

(b) For the purpose of this section, the term "qualified business" means a business that certifies, prior to the award of the contract, that it has a business location in New Jersey and employs at least two New Jersey residents.

NEW JERSEY REGISTER

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