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Proposed Regulations Issued for New Jersey Temporary Workers' Bill of Rights Law

Law and the Workplace on **August 11, 2023**

As previously reported, the New Jersey Temporary Workers' Bill of Rights Law (the "Law") took full effect on August 5, 2023. In light of this, the New Jersey Department of Labor & Workforce Development (the "Department") has proposed new rules to implement the Law.

Below are some highlights of the proposed regulations that temporary help service firms and employers who utilize their services should be aware of:

Scope of Coverage of the Law

The proposed regulations make clear that the Law applies to each temporary help service firm that is located, operates, or transacts business within New Jersey ("firms"). They further specify that the Law is applicable to each temporary laborer who is employed by a covered firm who either: (1) has been assigned by the firm to work in a designated classification placement within New Jersey; or (2) has been assigned by the firm to work in a designated classification outside of New Jersey, but who has his or her primary residence in New Jersey.

As a reminder, the Law only covers temporary laborers who are assigned to work by a firm in a "designated classification placement," which includes certain workers in food preparation and service, building and grounds cleaning/maintenance, personal care and service, construction, and transportations occupations, among others.

Equal Pay and Equivalent Benefits Requirement

The Law mandates that firms and employers contracting with those firms pay temporary laborers who are covered by the Law, at a minimum, the same average rate of compensation and average cost of benefits (or a cash equivalent thereof) as an employer's permanent employees who perform "the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" at the time the temporary laborer is assigned to work for the employer. The proposed regulations provide several areas of detail around this key requirement of the Law.

First, the proposed regulations define "benefits" in this context to mean "employee fringe benefits, including but not limited to, health insurance, life insurance, disability insurance, paid time off (including vacation, holidays, personal leave and sick leave in excess of what is required by law) training, and pension." Fringe benefits that an employer is required by law to provide its employees, such as NJ State Paid Sick Leave, are not included under the definition. However, the proposed regulations do not provide any additional guidance on how to calculate the value of benefits that must be considered as part of the analysis.

Additionally, the proposed regulations instruct employers to provide firms with "a listing of the hourly rate of pay and cost per hour of benefits for each employee of the [employer] who the [employer] determines would be a comparator employee" once the employer contracts with the firm for the services of the temporary laborer. If the employer pays a comparator employee on a salary basis, the comparator employee's annual salary must be divided by 2,080 hours to determine the comparator employee's hourly rate of pay. Similarly, "[t]o calculate the cost per hour of benefits, the annual cost to the employer of benefits [must] be divided by 2,080 hours."

A firm would then be required to use the method set forth in the proposed regulations to determine "the appropriate hourly rate of pay for the temporary laborer on a designated classification placement," which involves averaging the hourly rate of pay and cost of benefits for comparator employees and then "[s]ubtract[ing] the cost per hour of benefits provided by the [firm] to the temporary laborer from the sum of the [comparator employees'] average hourly rate of pay [] and the average cost per hour of benefits" to determine the hourly rate of pay the firm will pay the temporary labor.

Furthermore, the proposed regulations provide a list of 12 principles to apply to determine whether a temporary laborer and an employee are performing substantially similar work:

1. Substantially similar work should be viewed as a composite of skill, effort and responsibility performed under similar working conditions;
2. Functions and duties need not be identical in order to be substantially similar;
3. Occasional, trivial or minor differences in duties that only consume a minimal amount of the employee's time will not render the work dissimilar;
4. Job titles and job descriptions are relevant, but not dispositive;
5. The determination should focus on an analysis of the actual job duties performed, not the specific person performing the work;
6. The analysis should be applied to a full work cycle, not just a snap shot of a particular time period or day;
7. Skill is measured by factors such as the experience, ability, education and training required to perform a job;
8. Effort is the amount of physical or mental exertion needed to perform a job;
9. Responsibility is the degree of accountability and discretion required to perform a job;
10. The number of years of service of a particular employee is not relevant to the determination, even where the employer's compensation system is seniority based; rather, what is relevant is the number of years of experience that are required to perform a job;
11. The employer's use of a merit system for the compensation of its employees is not relevant to the determination; and
12. Working conditions, for the purpose of determining whether two jobs are being performed under similar working conditions, means the physical surroundings and hazards, but does not include job shifts.

Employer Recordkeeping Requirements

The Law requires employers to remit, within seven days from the last day of the work week worked by the covered temporary worker, the following information to the firm: "(1) the name and address [of the temporary laborer,] (2) the specific location sent to work, (3) the type of work performed, (4) the number of hours worked, (5) the hourly rate of pay, and (6) the date [the temporary laborer was sent to work]."

The proposed regulations provide that an employer will not violate the Law if they "ha[ve] been precluded from submitting those time records for reasons beyond its control." However, the regulations do not discuss what reasons would qualify as beyond an employer's control. An employer who fails to submit the necessary information will be subject to civil penalties up to $500.

Firm Notification Requirements

The Law's new hire notice requirement, which went into effect on May 7, 2023, requires firms to provide covered laborers, at the time of dispatch to an assignment, with certain information in writing, including contact information for the firm and the assigned worksite, the nature of the work to be performed and wages offered, scheduling details, and information about certain other benefits. The proposed regulations state that firms must use the assignment notification statement form made available on the Department's website. The regulations expressly state that "[t]he Commissioner [of the Department of Labor and Workforce Development] will not accept applications from temporary help service firms for approval of other assignment notification statement forms."

The Department has provided a 60-day comment period for these proposed new rules.

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