

52 N.J.R. 1661(a)

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RULE PROPOSALS

Reporter

52 N.J.R. 1661(a)

***NJ - New Jersey Register > 2020 > SEPTEMBER > SEPTEMBER 8, 2020 > RULE PROPOSALS
> LABOR AND WORKFORCE DEVELOPMENT -- DIVISION OF WAGE AND HOUR COMPLIANCE***

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

Text

New Jersey Call Center Jobs Act Rules

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

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

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

Proposal Number: PRN 2020-087.

Submit written comments by November 7, 2020, to:

David Fish, Executive Director
Legal and Regulatory Services
New Jersey 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 is proposing new rules at N.J.A.C. 12:71, in order to implement P.L. 2019, c. 470 (N.J.S.A. 34:21-8 through 34:21-15), the New Jersey Call Center Jobs Act (the Act). The Act requires that employers with a call center in New Jersey provide notice to the Commissioner of the Department of Labor and Workforce Development (Department) when they are going to relocate a call center, or transfer one or more facilities or operating units, comprising at least 20 percent of the 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). Employers with a call center in New Jersey are also required to provide notice when they have failed to 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. Under the Act, an employer who fails to provide the required notice to the Commissioner is subject to a penalty not to exceed \$ 7,500 for each day that the notice is deficient. Also, under the Act, each employer that provides the required notice is to be placed on a list maintained by the Commissioner and is to remain on that list for a period not to exceed 36 months, during which time the employer is ineligible to receive certain State financial assistance. Finally, the Act

requires each State department or agency, in making or awarding a contract for call center services, to grant a bidding preference to "qualified businesses located in the State and employing residents of the State." The Act provides that the Commissioner shall promulgate rules "to identify qualified businesses" and "set forth limits on the amount of preference that may be given to a qualified business located in the State employing residents of the State."

Following is a summary of the subchapters of proposed new N.J.A.C. 12:71:

Subchapter 1 contains general provisions, including the purpose and scope of the chapter and definitions of words and terms used throughout the chapter. At N.J.A.C. 12:71-1.2, the Department includes a definition for the term "call center" taken verbatim from the Act. The Department also defines the term "Act" to mean P.L. 2019, c. 470 (N.J.S.A. 34:21-8 through 15); defines the term "Commissioner" to mean the Commissioner of the Department of Labor and Workforce Development or his or her [page=1662] designee; and defines the term "Department" to mean the Department of Labor and Workforce Development. With regard to the term "employer," the Act states that it means "any business entity that employs 50 or more full-time workers or 50 or more workers that in the aggregate work at least 1,500 hours per week, excluding overtime hours, for the purpose of staffing a call center." What is missing from this definition is a method for determining whether the employer has met the 50-employee threshold. The Act does not specify when, or during what period of time, the business is to have employed 50 or more full-time workers or 50 or more workers that in the aggregate work at least 1,500 hours per week for the purpose of staffing a call center in order to fall within the Act's definition of "employer." In order to address this, the Department has adopted the approach taken by the Legislature in assessing the 30-employee threshold for coverage under the New Jersey Family Leave Act (NJFLA), N.J.S.A. 34:11B-1 et seq. At N.J.S.A. 34:11B-3.f, the NJFLA states that an "employer" is one that employs 30 or more employees for each working day during each of 20 or more calendar workweeks in the then-current or immediately preceding calendar year. New Jersey employers have been applying the NJFLA standard successfully for decades for the purpose of determining NJFLA coverage. Consequently, it makes sense to the Department, in the absence of any express mandate within the Act, to choose a standard with which employers and regulators are already familiar and to apply that standard for the purpose of calculating the 50-employee threshold. Thus, at proposed N.J.A.C. 12:71-1.2, the Department defines the term "employer" to mean 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 Department also states that 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 communications, been assigned for a limited duration to assist with call center functions. The definition of "employer" within the Act expressly states that the 50-employee count is to include only those who are employed "for the purpose of staffing a call center." It is for this reason that the Department believes the Legislature did not intend for the 50-employee count to include those who are principally employed for a purpose other than staffing a call center. The Act is intended to address the outsourcing of call center functions and should not, for the purpose of determining coverage, penalize employers who for a limited duration due to an unanticipated increase in call volume must temporarily reassign (or in-source) existing employees in other areas of the operation to perform call center duties. The Act also does not define the terms "employee" or "full-time." Within the proposed rule, the Department defines the term "employee" to mean "employee" as that term is defined within the State Wage Payment Law; specifically, at N.J.S.A. 34:11-4.1 ("any person suffered or permitted to work by an employer, except that independent contractors and subcontractors shall not be considered employees"). The Department defines the term "full-time" to mean working an average of 30 or more hours per week. There is very little guidance in State or Federal law, rule, or regulation, as to what constitutes "full-time" employment. However, the Affordable Care Act

(ACA), does distinguish between large and small employers for the purpose of imposing different obligations under the Act, defining a large employer as one who employs 50 or more full-time employees. Under the ACA, a full-time employee is, for a calendar month, an employee employed on average at least 30 hours of service per week. Also, and perhaps more importantly, within the NJ Call Center Jobs Act itself, the alternate method for calculating the 50-employee threshold is where the business employs "50 or more workers that in the aggregate work at least 1,500 hours per week, excluding overtime hours, for the purpose of staffing a call center." One thousand five hundred hours divided by 50 employees equals 30 hours per employee. This would appear to indicate that the Legislature, for the purpose of defining the term "employer" under the Act, considers 30 hours worked per week, excluding overtime hours, to be the equivalent of one full-time employee. Finally, proposed N.J.A.C. 12:71-1.3 states that 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 will be used to determine whether an individual is an employee or an independent contractor under the Act and the proposed new chapter.

Subchapter 2 addresses the requirement at N.J.S.A. 34:21-10.a that any 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 operating 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. Most importantly, the proposed new rule sets forth the method that would be used to determine whether a call center employer has complied with the staffing requirement. Specifically, proposed new N.J.A.C. 12:71-2.1 explains that first, one would 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 taking the following steps: (1) tabulate the total hours worked for each month during the six-month period; (2) array each of the six monthly hours worked totals from lowest to highest; (3) discard the highest number and the lowest number; (4) add the remaining monthly hours worked totals together and divide the sum by four. This presumes that the average monthly staffing level during that six-month period was, in fact, the staffing level "capable of handling" 100 percent of the call volume during the period. Also, the method of discarding the high and low numbers and averaging the remaining four numbers is intended to eliminate outliers, ensuring the most accurate calculation of a true average. Then, one would multiply 0.65 by the number just calculated, and round that figure to the nearest integer. The result is the minimum average monthly staffing level (in hours worked) that the employer must maintain during the then-current six-month period in order to comply with N.J.S.A. 34:21-10.a. The Act expressly states that the comparator period is the "previous six-month" period. Consequently, it follows that that "previous six-month" period should be compared to the then-current six-month period; that is, it should be a comparison of a six-month average to a six-month average. The proposed new rule also explains that the "then-current six-month period" does not refer to a series of rolling monthly calculations; the measurement is performed semi-annually. The regulated community (in order to ensure compliance with the Act) and the Department (in order to effectively enforce the Act) require discrete, quantifiable measurements upon which to base their calculations. It is the Department's reasoned judgment that proposed new N.J.A.C. 12:71-2.1 serves that important end while remaining true to the intent of the Act.

Subchapter 2 also addresses the requirements at N.J.S.A. 34:21-10.a and b concerning what happens when a call center employer fails to maintain the required staffing levels, or transfers New Jersey electronic traffic covered under the law to another state. The subchapter delineates how the Act's notification requirements would be carried out. Specifically, the Act states that notification to the Commissioner of a call center employer's failure to maintain the required staffing level pursuant to N.J.S.A. 34:21-10.a is to occur "immediately," and that notification of a relocation or transfer of operations is to occur at least 90 days prior to the relocation or transfer of operations. Proposed new N.J.A.C. 12:71-2.2 repeats the statutory requirements and states that "immediately," for the purpose of complying with the notice requirement at N.J.S.A. 34:21-10.a, means no later than the close of business on the fifth business day following the then-current six-month period. So, for example, a

business that qualifies as an "employer" as of the July 1, 2020, effective date of the Act would be comparing the average staffing level for the period from July 1, 2020 through December 31, 2020, to the staffing level during the comparator six-month period from January 1, 2020 through June 30, 2020. If on December 31, 2020, that employer was to determine that it had fallen below the required staffing level for the then-current six-month period, [page=1663] the employer would be required to notify the Commissioner by the end of the fifth business day following December 31, 2020, which would be Friday, January 8, 2021 (since Friday, January 1, 2021, is a holiday, and the next business day is Monday, January 4, 2021). Finally, the proposed new rule states that the employer is to use a form made available to employers on the Department's website in order to provide the required notification.

Subchapter 3 addresses violations and penalties. Specifically, proposed new N.J.A.C. 12:71-3.1 states that when the Commissioner finds that an employer has violated the notification requirements set forth at N.J.A.C. 12:71-2.2, he or she 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. Proposed new N.J.A.C. 12:71-3.1 also states that no penalty shall be levied, unless the Commissioner provides the alleged violator with notification of the violation and the amount of the penalty and an opportunity to request a hearing. In addition, the proposed new rule lists factors that the Commissioner will consider when determining what constitutes an appropriate penalty for the particular violation; namely, the seriousness of the violation, the past history of previous violations by the employer, the good faith of the employer, the size of the employer's business, and any other factors that the Commissioner deems to be appropriate in determining the penalty assessed. Finally, the proposed new rule indicates that all penalties must be paid within 30 days of the date of the final order, and requires that all payments be made to the Commissioner by certified check or money order, or in another form suitable to the Commissioner.

Subchapter 4 addresses the requirement in the Act that the Commissioner maintain a list (updated monthly) of all employers that provide notification under N.J.A.C. 12:71-2.2. It also states that the list will contain the names of employers who, following investigation by the Department, are determined to have violated the notification requirement under the Act (that is, employers who should have, but did not, provide the required notification). The Act does not expressly state that violators are to be included on the list. However, 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 by failing to maintain the appropriate call center staffing level or relocating or transferring a call center operation, and who have also failed to adhere to the Act's notification requirement. In addition, proposed new N.J.A.C. 12:71-4.1 states that an employer who is placed on the list shall remain on the list for a period of time determined appropriate by the Commissioner, not to exceed 36 months. N.J.S.A. 34:21-11 expressly states that "an employer shall remain on the list for a period **not to exceed 36 months** after each instance of notification ..." (emphasis added). This "not to exceed" language traditionally means that the Commissioner does not have the discretion to impose a sanction of more than 36 months on the list, but does have the discretion to impose a sanction of less than 36 months on the list where he or she determines that there are mitigating circumstances justifying the lesser sanction. Accordingly, the proposed new rule includes factors to be considered by the Commissioner when determining the appropriate period of time that the employer will remain on the list; namely, whether the employer voluntarily provided the required notification versus having been determined, following an investigation, to have violated the notification requirement, the past history of previous violations by the employer, the good faith of the employer, and any other factors that the Commissioner deems appropriate in the determining the sanction imposed. In addition, proposed new N.J.A.C. 12:71-4.1 states that no employer shall be placed on the list, 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. Finally, proposed new N.J.A.C. 12:71-4.1 states that the Commissioner will make the list available to the public and prominently display a link to the list on the Department's website.

Proposed new N.J.A.C. 12:71-4.2 indicates that an employer who is included on the list will be ineligible to receive any direct or indirect State grant, guaranteed loan, tax benefit, or any other State financial

support for the period of time that the employer is on the list. Like the statute, the proposed new rule creates an exemption from the ban on State grants to allow employers on the list to receive particular types of assistance that provide training to employees, and enumerates those instances. It also includes the statutory definition for the term "tax benefit."

Subchapter 5, which addresses appeals, states that 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, in writing, notify the employer of the reasons for the action taken and provide an opportunity for a hearing 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 Procedure Rules, N.J.A.C. 1:1. Proposed new N.J.A.C. 12:71-5.1 also states that all requests for a hearing must be filed within 10 business days from the date of receipt of notice, provides an address to send all requests for a hearing, states that in the absence of a timely request for a hearing, the determination of the Department is deemed the final administrative action, and indicates that all requests for a hearing will 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.

Subchapter 6 addresses the requirement at N.J.S.A. 34:11-13 and 15 that a State department or agency, in making or awarding a contract for call center services, must grant "a preference for such contract" to "qualified businesses located in the State and employing residents of the State," and instructing the Commissioner through rulemaking to "identify qualified businesses" and "set forth limits on the amount of preference that may be given to a qualified business located in the State employing residents of the State." Accordingly, the proposed new rule states that 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. The rule also sets forth the "limits on the amount of preference" as follows: 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; specifically, for the purpose of evaluating "price and other factors," the preference given to a qualified business shall be either: (1) an amount on price not to exceed 10 percent; or (2) a point allocation not to exceed 10 percent.

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

Social Impact

The vast majority of the proposed new rules either mirror the Act or are necessitated by the Act. Therefore, whatever negative social impact might be felt would derive in the first instance from the Act and not the proposed new rules. As to the remainder of the new rules, it is the Department's belief that they would have a positive social impact in that they would minimize any possible confusion as to who is covered by, what acts are prohibited, and what sanctions may be imposed under the Act. Furthermore, the proposed new rules would have a positive social impact in that they would establish a process for the assessment of penalties, placement of a call center employer on "the list," and the hearing of appeals, thereby, enabling the Department to effectively enforce the law. Finally, the proposed new rules would have an overall positive social impact in that they would provide a regulatory framework for the Department's administration of an Act that has as its purpose the protection of the jobs of New Jersey residents. In that the Act's provisions will provide workers and their families with a greater degree of economic security and peace of mind, the proposed rules would have the same social impact.

Economic Impact

As indicated in the Social Impact above, the majority of the proposed new rules either mirror the Act or are necessitated by the Act. Therefore, whatever negative economic impact might be felt by employers would derive in the first instance from the Act, not the proposed new rules. That portion of the new rules that addresses the levying of penalties by the Department against those who violate the Act would, of course, have a negative economic impact upon those employers who run afoul of the Act. Similarly, that portion of the new rules that addresses placement of employers on a list that would result in their ineligibility for certain State [page=1664] financial assistance for a period not to exceed 36 months would have a negative economic impact upon those employers who experience events or make business decisions that result in their placement on the list. As to the remainder of the new rules, it is the Department's belief that they would have a positive economic impact in that they would minimize any possible confusion as to who is covered by, and what acts are prohibited under, the Act, among other important issues. It is the Department's hope that minimizing confusion as to these issues will avoid costs for those impacted by the Act of unnecessary litigation that might otherwise result.

Federal Standards Statement

The proposed 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.

Jobs Impact

The Department does not anticipate that the proposed new rules would result in either the generation or loss of jobs. Rather, it is the Department's understanding that the intent of the Act and, therefore, the rules promulgated to implement the Act, would be to protect existing jobs.

Agriculture Industry Impact

The Department does not anticipate that the proposed new rules would have any impact on the agriculture industry in that the impact of the proposed new rules should be limited to call center employers, not agricultural employers.

Regulatory Flexibility Analysis

The proposed new rules may impose reporting, recordkeeping, and compliance requirements on small businesses, as that term is defined within the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. That is, the Regulatory Flexibility Act defines the term "small business" to mean a business that is resident in the State, independently owned and operated, and not dominant in its field, and which employs fewer than 100 full-time

employees. Because the proposed new rules apply only to call center employers that employ 50 or more full-time employees (or their equivalent in aggregate hours worked), any requirements under those rules would only impact those "small businesses" with between 50 and 99 full-time employees (or their equivalent in aggregate hours worked). As to that subset of "small businesses," the proposed new rules would require that they track the number of hours worked by their call center employees for the purpose of calculating whether the notification requirements have been triggered, and in the event that the notification requirements have been triggered, then the proposed new rules would require that the affected call center employer file with the Department the required notification(s). Finally, once the notification requirement has been triggered, the affected call center employer who does not comply is subject to penalties. As indicated earlier, the New Jersey Call Center Jobs Act (P.L. 2019, c. 470) limits application of the afore-mentioned requirements to call center employers that employ 50 or more full time employees or their equivalent in terms of aggregate hours worked. The proposed new rules contain the same limitation, which essentially halves the impact of the afore-mentioned requirements on "small businesses."

Housing Affordability Impact Analysis

The proposed new rules would not evoke a change in the average costs associated with housing, nor on the affordability of housing in the State. The basis for this finding is that the proposed new rules pertain to the staffing levels of call center employers. The proposed new rules do not pertain to housing.

Smart Growth Development Impact Analysis

The proposed new rules would not evoke a change in the housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed new rules pertain to the staffing levels of call center employers. The proposed 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 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 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.

(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.

"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:

[page=1665] 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;
- 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.

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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.

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.

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(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.

(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).

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(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.

(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.

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. [page=1666] 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.