



21 of 44 DOCUMENTS

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**RULE ADOPTIONS**

**LABOR AND WORKFORCE DEVELOPMENT  
DIVISION OF WORKERS' COMPENSATION**

*43 N.J.R. 1030(a)*

**Adopted New Rule: N.J.A.C. 12:235-13.7**

**Stop-Work Order**

Proposed: November 1, 2010 at *42 N.J.R. 2566(a)*.

Adopted: March 25, 2011 by Harold J. Wirths, Commissioner, Department of Labor and Workforce Development.

Filed: March 25, 2011 as R.2011 d.127, **without change**.

Authority: *N.J.S.A. 34:1-5, 34:1-20, 34:1A-3(e)* and *34:15-79*.

Effective Date: April 18, 2011.

Expiration Date: July 28, 2011.

**Summary of Hearing Officer's Recommendations and Agency's Response:**

A public hearing regarding the proposed new rule was held on November 19, 2010 at the Department of Labor and Workforce Development. David Fish, Regulatory Officer, was available to preside at the public hearing and to receive testimony regarding the proposed new rule. After reviewing the testimony presented at the public hearing and the written comments submitted directly to the Office of Legal and Regulatory Services, the hearing officer recommended that the Department proceed with the new rule without change. The record of the public hearing may be reviewed by contacting David Fish, Executive Director, Office of Legal and Regulatory Services, Department of Labor and Workforce Development, P.O. Box 110, Trenton, New Jersey 08625-0110.

**Summary** of Public Comments and Agency Responses:

Written comments were submitted by the following individual:

1. John J. Sarno, President, Employers Association of New Jersey (EANJ), Livingston, NJ.

COMMENT: The commenter suggests that the following phrase be added to proposed new N.J.A.C. 12:235-13.7(a): "with the intent to violate the statutory obligation to provide workers' compensation coverage." Consequently, with the change suggested by the commenter, N.J.A.C. 12:235-13.7(a) would read, "Besides any other penalties, remedies or sanctions as provided by statute or regulation, an employer who, *with the intent to violate the statutory obligation to provide workers' compensation coverage*, knowingly fails to provide workers' compensation coverage, who knowingly misrepresents one or more employees as independent contractors or who knowingly provides false, incomplete or misleading information concerning the number of employees, shall be subject to a stop-work order by the Director of the Division of Workers' Compensation" (the commenter's suggested new text is underlined for emphasis). Furthermore, the commenter suggests that proposed new N.J.A.C. 12:235-13.7(b) be changed in pertinent part to read: "[t]he following factors shall be considered in determining whether a violation under (a) shall be considered to be 'intentional and knowing.'" New N.J.A.C. 12:235-13.7(b), as proposed by the Department, currently reads in pertinent part: "[a] violation under (a) above shall be considered 'knowing' if the employer. . ." The commenter does not suggest changing paragraphs (b)1, 2 or 3, which list the factors to be considered when determining whether a violation is "knowing."

In support of his suggested changes to proposed new N.J.A.C. 12:235-13.7(a) and (b), the commenter asserts that "as the proposed new rule currently reads is ambiguous as to what constitutes a knowing violation." The commenter also maintains that, "the extraordinary act of unilaterally issuing a stop-work order prior to a hearing based on a knowing violation should be supported by evidence of conscious wrongdoing," adding that he, "believes the above amendatory language [containing the words "intent" and "intentional"] more properly supports the extraordinary and punitive remedy of a unilateral stop-work order prior to a hearing."

As to proposed new N.J.A.C. 12:235-13.7(e), which addresses the right of an employer who is subject to a stop-work order to apply to the Director of the Division of Workers' Compensation for a hearing to contest whether the employer committed the violation on which the order was based, the commenter states the following: The primary purpose of the hearing provided in proposed N.J.A.C. 12:235-13.7(e) is to permit the employer the opportunity to present evidence and/or to rebut the Director's evidence of a knowing (and intentional) violation on which to support the unilateral issuance of a stop-work order. However, fundamental due process should allow the employer an opportunity, upon a proper showing, to continue operating its business before a final determination on the merits. Therefore, EANJ suggests the following new section, (e)3: "The Director shall have the authority to stay or otherwise hold in abeyance, or to modify, a stop-work order, for good cause shown, pending a final decision."

RESPONSE: With regard to the commenter's suggested changes to proposed new N.J.A.C. 12:235-13.7(a) and (b), the law (P.L. 2009, c. 87) requires that a

violation be knowing in order for the Director to issue a stop-work order. The Legislature does not use the terms "intent" or "intentional." Therefore, to make the changes suggested by the commenter, which would require that a violation be both knowing and intentional in order for the Director to issue a stop-work order, would be inconsistent with the law and, therefore, outside the Department's rulemaking authority. As to the factors proposed by the Department for use by the Director in determining whether a violation is "knowing" (that is, the factors set forth at proposed new N.J.A.C. 12:235-13.7(b)1, 2 and 3), it is important, in light of the statutory requirement that the Director issue a determination prior to a hearing, that the Department delineate within the rules an objective test for use by the Director. That is, under the statutory scheme (from which the Department has no authority to deviate) the Director would have no opportunity prior to the issuance of a stop-work order to conduct a hearing at which testimony might be offered as to the actor's state of mind. Thus, the Department has devised the three-part test at proposed new N.J.A.C.

12:235-13.7(b)1, 2 and 3, which would allow the Director to reach a pre-hearing conclusion as to the issue of whether a knowing violation has occurred based on, again, objective criteria, such as (1) whether the employer has previously obtained workers' compensation insurance and the insurance has been cancelled or the insurance has not been continued or renewed; (2) whether there is evidence that the employer has been advised of the need for workers' compensation insurance; or (3) whether the employer has had one or more previous violations of the workers' compensation coverage requirements, including, but not limited to, failure to obtain workers' compensation insurance or to qualify as a self-insuring employer, misreporting or misrepresentation of the number of employees and/or misreporting or misrepresentation of employees as independent contractors.

With regard to the commenter's suggested change to proposed new N.J.A.C. 12:235-13.7(e) and, further, with regard to his concern that issuing a stop-work order prior to affording the affected employer with a [page=1031] hearing would be inconsistent with fundamental due process, as indicated earlier, the law (P.L. 2009, c. 87) is clear and unambiguous as to the manner and timing of both the issuance and appeal of a stop-work order. Specifically, the law states that upon a determination by the Director, after investigation, that there has been a knowing violation, the Director "shall issue, not later than 72 hours after making the determination, a stop-work order requiring the cessation of all business operations of that employer at every site at which the violation occurred." The law indicates that "the order shall take effect when served upon the employer, or, for a particular worksite, when served at that worksite." The law states that "the order shall remain in effect until the Director issues an order releasing the stop-work order upon finding that the employer has come into compliance with the requirements of this section and has paid any penalty assessed under this section." Finally, the law states that "an employer who is subject to a stop-work order shall have the right to apply to the Director, not more than 10 days after the order is issued, for a hearing to contest whether the employer committed the violation on which the order was based, and the hearing shall be afforded and a decision rendered within 48 hours of the application." Thus, the law itself requires the issuance of a pre-hearing stop-work order with a right of expedited appeal (10 days to appeal; 48 hours to afford a hearing and render a decision). The law says nothing of providing the employer "the opportunity to present evidence and/or to rebut the Director's evidence of a knowing [] violation" prior to the issuance of the stop-work order, nor does the law grant the Director the authority to "stay or otherwise hold in abeyance, or to modify, a stop-work order, for good cause shown, pending

a final decision." As indicated earlier, the Department has no discretion to deviate from the law.

The following individual testified at the November 19, 2010 public hearing:

1. Rich Marcolus, Chair, New Jersey Advisory Council on Safety and Health, Nutley, NJ:

COMMENT: The commenter suggests that the Department change proposed new N.J.A.C. 12:235-13.7, so as to incorporate procedures detailing where and how an individual or organization may file a complaint alleging that an employer has violated P.L. 2009, c. 89, thereby triggering an investigation by the Director, which may result in the issuance of a stop-work order.

RESPONSE: The Director's investigation of an employer for a possible violation(s) of P.L. 2009, c. 87, need not be initiated by a complaint. When and if the Director becomes aware of a possible violation, through whatever means, he or she is required to investigate and take the appropriate action. It is the standard and procedure for making and appealing such determinations, which is important to address through rulemaking. The Department believes that it is unnecessary to include a complaint procedure within proposed new N.J.A.C. 12:235-13.7. Thus, the Department declines to make the change suggested by the commenter.

#### **Federal Standards Statement**

A Federal standards analysis is not required because the adopted new rule is not subject to any Federal standards or requirements. Specifically, the subject matter of the adopted new rule is governed by State law, *N.J.S.A. 34:15-1* et seq. (the Workers' Compensation Law).

**Full text** of the adopted rule follows:

12:235-13.7 Stop-work order

(a) Besides any other penalties, remedies or sanctions as provided by statute or regulation, an employer who knowingly fails to provide workers' compensation coverage, who knowingly misrepresents one or more employees as independent contractors or who knowingly provides false, incomplete or misleading information concerning the number of employees, shall be subject to a stop-work order by the Director of the Division of Workers' Compensation.

(b) A violation under (a) above shall be considered to be "knowing" if the employer:

1. Has previously obtained workers' compensation insurance and the insurance has been cancelled or the insurance has not been continued or renewed;

2. Has been advised of the need for workers' compensation insurance by the Division of Workers' Compensation or any other agency of the New Jersey Department of Labor and Workforce Development; or

3. Has had one or more previous violations of workers' compensation coverage requirements, including, but not limited to, failure to obtain workers' compensation insurance or to qualify as a self-insuring employer, misreporting

or misrepresentation of the number of employees and/or misreporting or misrepresentation of employees as independent contractors.

(c) A stop-work order against an employer shall apply against any successor firm, corporation or partnership of the employer in the same manner that it applies to the employer.

(d) On finding a violation under (a) above after investigation, the Director shall issue, not later than 72 hours after making such determination, a stop-work order requiring the cessation of all business operations of the employer at every site at which the violation occurs.

1. A stop-work order shall take effect when served upon the employer, or, for a particular employer worksite, when served at the worksite.

2. A stop-work order shall remain in effect until the Director issues an order releasing the stop-work order upon finding that the employer has come into compliance and has paid any penalty assessed.

(e) An employer who is subject to a stop-work order shall have the right to apply to the Director, not more than 10 days after the order is issued, for a hearing to contest whether the employer committed the violation on which the order was based.

1. Application to the Director for a hearing by an employer who is subject to a stop-work order shall be in writing and hand delivered to the Director within the statutorily prescribed period at 1 John Fitch Plaza, Trenton, New Jersey, or submitted by certified mail, postmarked within the prescribed period, to the Director, Division of Workers' Compensation, P.O. Box 381, Trenton, New Jersey 08625-0381.

2. The hearing shall be afforded and a decision rendered by the Director or the Director's designee in the Director's absence within 48 hours of the Director's receipt of the application.

(f) Failure or refusal to comply with a stop-work order issued by the Director shall, in addition to any other penalties provided by law, result in the assessment of a penalty of not less than \$ 1,000 and not more than \$ 5,000 for each day the employer is found not to be in compliance.