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RULE ADOPTIONS

**LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF WAGE AND HOUR COMPLIANCE**

43 N.J.R. 2351(a)

Readoption: N.J.A.C. 12:56

Wage and Hour Rules

Proposed: March 7, 2011 at 43 N.J.R. 553(a).

Adopted: August 4, 2011 by Harold J. Wirths, Commissioner, Department of Labor and Workforce Development.

Filed: August 4, 2011 as R.2011 d.233, **without change**.

[page=2352] Authority: N.J.S.A. 34:1-20; 34:1A-3(e); 34:2-21.64; and 34:11-56a et seq., specifically 34:11-56a5 and 34:11-56a19.

Effective Date: August 4, 2011.

Expiration Date: August 4, 2018.

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

A public hearing on the proposed readoption was held on March 29, 2011 at the Department of Labor and Workforce Development. David Fish, Regulatory Officer, was available to preside at the public hearing and to receive testimony. There were no attendees at the public hearing. However, written comments were submitted directly to the Office of Legal and Regulatory Services. After reviewing the written comments, the hearing officer recommended that the Department proceed with the readoption without change.

Summary of Public Comment and Agency Response:

Written comments were submitted by the following individual:

John J. Sarno, President, Employer Association of New Jersey, Livingston, NJ.

COMMENT: Mr. Sarno takes issue with the definition of the term "wages," which appears at N.J.A.C. 12:56-2.1. Specifically, he suggests that the definition be amended so as to add the following phrase, "But 'wages' does not mean holiday, vacation or sick pay or payments made pursuant to a paid time off policy or benefits plan." Mr. Sarno also suggests that N.J.A.C. 12:56-3.1, regarding the statutory minimum wage, be amended so as to add the following phrase, "But deductions authorized by N.J.S.A. 34:11-4.4 and regulations promulgated thereunder shall not be counted when calculating the minimum hourly wage." In support of the latter suggestion, Mr. Sarno states that there are times when a proper deduction may reduce the hourly take home pay to an amount less than the statutory minimum wage, adding that in such instances, so long as the pre-deduction hourly rate of pay is at or above the statutory minimum wage there should be no violation of the State's minimum wage law.

Finally, Mr. Sarno suggests that N.J.A.C. 12:56-1.3, regarding administrative penalties, be amended so as to incorporate a "safe harbor" provision. Specifically, Mr. Sarno suggest that a new subsection (d) be added to N.J.A.C. 12:56-1.3, which would read, "If an employer has a clearly communicated policy that prohibits wage and hour violations and includes a complaint mechanism, reimburses employees for any improper violations and makes a good faith commitment to comply in the future, such employer will not be subject to administrative penalties."

RESPONSE: Regarding the commenter's first suggestion, the purpose of N.J.A.C. 12:56 is to "establish rules to effectuate N.J.S.A. 34:11-56a, the New Jersey State Wage and Hour Law." N.J.A.C. 12:56-1.1. The definition of the term "wages" to which the commenter objects, which appears at N.J.A.C. 12:56-2.1, is taken directly from the New Jersey State Wage and Hour Law; specifically, N.J.S.A. 34:11-56a1. The Department has no discretion to define the term "wages" within N.J.A.C. 12:56-2.1 in a manner that is inconsistent with the State Wage and Hour Law.

Regarding the commenter's second suggestion, for purposes of determining compliance with the State's statutory minimum wage requirements, an individual's hourly wage is, in fact, determined by dividing an individual's *gross pay* by his hours worked, *not* by dividing his *net pay* by hours worked. In other words, under the existing law and rules, legal deductions from an individual's pay are not used to reduce the numerator (wages) in the hourly wage calculation. Consequently, no change to the existing rules is necessary.

Regarding the commenter's final suggestion, as indicated in the notice of proposal, the Department has determined that the existing rules are necessary, reasonable and proper for the purposes for which they were originally promulgated. Consequently, the Department declines to make any changes to the chapter on adoption. Nevertheless, as also indicated in the notice of proposal, the Department is currently in the process of undertaking a thorough review of the chapter for purposes of assessing whether amendments are needed in order to reflect changes in law or policy. The Department will examine the commenter's "safe harbor" suggestion as part of that chapter-wide review. If the Department ultimately determines that an amendment is warranted, a notice of proposal containing that amendment will appear in a later issue of the New Jersey

Register.

Federal Standards Statement

The readopted rules do not exceed standards or requirements imposed by Federal law. See 29 U.S.C. §§ 201 et seq. Consequently, a Federal standards analysis is not required.

Full text of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 12:56.