Employers Association of New Jersey

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April 26, 2011

David Fish,
Regulatory Officer
Office of Legal and Regulatory Services
N.J. Department of Labor and Workforce Development
P.O. Box 110 – 13th Floor
Trenton, New Jersey 08625-0110

Re: Comments to the Readoption of N.J.A.C. 12:56, *et. seq.*

Dear Mr. Fish:

The Employers Association of New Jersey (EANJ) submits the following comments to the N.J. Department Labor and Workforce Development (the "Department"), which has proposed readoption of N.J.A.C. 12:56, Wage and Hour Rules.

EANJ commends the Department for undertaking the long overdue review of the state's wage and hour regulations. Indeed, in proposing the repeal of N.J.A.C. 12:57-7, the Department has observed inconsistencies that have caused "considerable confusion and consternation within the regulated community." *See* Rule Proposals, vol. 43, March 21, 2011. Thus, EANJ's comments will focus on various points of confusion within the wage and hour rules that it respectfully suggests should be clarified at this time. EANJ will also be proposing a Safe Harbor rule.

As the Department is aware, EANJ fields numerous calls from its employer-members on a wide variety of workplace issues, including the proper interpretation and application of the state's wage and hour rules. A significant area of contention is the definition of "wages" and whether paid time off is included in the definition. For example, it is a longstanding opinion of the Department that vacation pay can be permissibly withheld under a bon fide written policy. For example, an employer may have a policy that an employee must provide two-week written notice before quitting in order to be eligible for the value of unused vacation days when employment terminates. Or an employer may have a "use-it or lose-it" paid time off policy. In either case, if a condition is not met by the employee, the employer is not obliged to pay out the paid time off at the end of employment.

30 West Mount Pleasant Avenue - Suite 201 • Livingston, New Jersey 07039
(973) 758-6800 • (609) 393-7100 • Fax: (973) 758-6900 • Website: www.eanj.org

In contrast, wages must be paid for all hours worked and generally speaking they cannot be withheld. *See* N.J.S.A. 34:11.4.4. Thus, EANJ proposes that the definition of "wages" contained in N.J.A.C. 12:56-2.1 clarify that wages do not mean holiday, vacation or other paid time off amounts. Accordingly, EANJ proposes the following clarification to be added to the definition of "Wages":

But "wages" does not mean holiday, vacation or sick pay or payments made pursuant to a paid time off policy or benefits plan.

Another confusing issue arises out of N.J.A.C. 12:56-3.1, the Minimum Wage. There are many situations where an authorized deduction(s) is permitted under the Wage Payment law. *See* N.J. S.A. 34:11.4.4. However, there are times when such a proper deduction may reduce the hourly take home pay below the statutory minimum. Perhaps the best example is where a collective bargaining agreement requires the employer to deduct union dues from an employee's pay who may be earning the statutory minimum wage. Another example would be a deduction authorized for an employee's contribution to a healthcare insurance premium. These deductions could reduce the hourly take home pay below the statutory minimum. Accordingly, EANJ proposes the following clarification to be added to N.J.A.C. 12:56-3.1:

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 rate.

In proposing the repeal of N.J.A.C. 12:57-7, the Department has noted that the United States Department of Labor substantially revised the federal wage and hour regulations. *See* Rule Proposals, vol. 43, March 21, 2011. A major part of those revisions were the adoption of a Safe Harbor Rule. The Safe Harbor rule provides a window for correction to provide that isolated or inadvertent deductions from the pay of an otherwise exempt, salaried employee will not defeat the exemption. Thus, a clerical or time-keeping error will not destroy a valid exemption if an employer has instituted a proper Safe Harbor policy.

29 CFR Part 541.603 (d) reads, in relevant part:

> If an employer has a clearly communicated policy that prohibits improper deductions ... and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

EANJ understands that the Department is accepting comments until May 20, 2011 on the repeal of N.J.A.C. 12:56-7 (existing rules regarding exemptions) and is proposing a new rule that would adopt by reference federal rule 29 CFR Part 541. However, N.J.A.C. 12:56-7 is limited to the exemptions themselves and it does not appear from the face of the rule proposal that the Department is considering a Safe Harbor policy in connection with that rule. Accordingly, EANJ

respectfully suggests that a Safe Harbor rule be incorporated into N.J.A.C. 12:56-1.3, Administrative Penalties, which would apply to all wage and hour violations.

The U.S. Department of Labor believes that a Safe Harbor rule "is an appropriate mechanism to encourage employers to adopt and communicate employment policies prohibiting improper pay deductions, while continuing to ensure that employees whose pay is reduced in violation of the salary basis test are made whole." *Federal Register*, vol. 69, no. 79, page 22182, April 23, 2004. In the federal department's view a Safe Harbor rule achieves the goals of proactive management practices and correcting unlawful payroll practices. EANJ shares these goals and believes that the Department shares these goals as well.

It would be best for the Department to propose a stand-alone Safe Harbor rule because if an employee were made whole as the result of an internal, company inquiry, it would eliminate the need to file a formal charge with the Department, thus saving time and resources for everyone involved. EANJ believes that **S-2014** recently signed by the Governor and now in effect authorizes the Department to adopt "substantial changes" to the proposed readoption. Under S-2014, "substantial changes" means "any changes to a proposed rule that would significantly: enlarge or curtail who and what will be affected by the proposed rule; change what is being prescribed, proscribed or otherwise mandated by the rule; or enlarge or curtail the scope of the proposed rule and its burden on those affected by it." EANJ concedes that adding a Safe Harbor rule would be a "substantial change" to the readoption but respectfully requests that a Safe Harbor rule be included as a new section (d) to N.J.A.C. 12:56-1.3.

EANJ adds this personal, historical note in support of a Safe Harbor rule. In June 2004, during the administration of James McGreevy, and as the federal wage and hour rules were being substantially revised, EANJ wrote then-labor commissioner Kroll suggesting that he evaluate New Jersey's wage and hour regulations "to determine whether they should be revised to more closely follow the Fair Labor Standards Act regulations." Commissioner Kroll reaffirmed the Department's mission but nothing was done to re-evaluate the state's wage and hour rules.

During the Jon Corzine administration, EANJ made the same suggestion to Commissioner Socolow, who politely but firmly told EANJ that amending the state wage and hour rules to better conform with the federal rules was not in the offing.

EANJ has a long and abiding appreciation for fair wage and hour regulation and enforcement. It has long sought to assist its members in complying with sometimes confusing, often overlapping, and even conflicting federal and state wage and hour rules. Certainly employees should be protected from employer violations and be made whole when violations occur. But employers that voluntarily and proactively do the right thing shouldn't be punished. Therefore, EANJ requests that the Department adopt a Safe Harbor rule as a new section (d) to N.J.A.C. 12:56-1.3, to 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.

However, should the Department choose not to make a substantial change at this time, an alternative would be to modestly revise N.J.A.C. 12:56-1.3 (c) which lists various factors in accessing administrative penalties and clarify that the "good faith of the employer" includes "the existence of a Safe Harbor policy in accordance with 29 CFR 541.603 (d)." Such an addition would make clear that the Department valued proactive employment practices and would provide encouragement for voluntary employer compliance with the wage and hour rules.

Respectfully submitted,

John J. Sarno
President
Employers Association of New Jersey