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RULE ADOPTIONS

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

46 N.J.R. 91(a)

Adopted Amendments: N.J.A.C. 12:2-1.3 and 12:2 Appendix

Adopted New Rules: N.J.A.C. 12:2-2 and 12:2 Appendix B

Notification Posted by Employer Pursuant to P.L. 2012, c. 57, Relating to the Right to be Free of Gender Inequity or Bias in Pay, Compensation, Benefits, or Terms, Conditions, or Privileges of Employment

Proposed: January 7, 2013, at 45 N.J.R. 17(a) (see also 45 N.J.R. 109(a)).

Adopted: December 4, 2013, by Harold J. Wirths, Commissioner, Department of Labor and Workforce Development.

Filed: December 4, 2013, as R.2014 d.005, **with technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.5).

Authority: N.J.S.A. 34:1-20 and 34:1A-3(e); and P.L. 2009, c. 194, sec. 4.a (N.J.S.A. 34:1A-1.14), and P.L. 2012, c. 57, Sec. 1.a (N.J.S.A. 34:11-56.12).

Effective Date: January 6, 2014.

Expiration Date: November 7, 2018.

Summary of Hearing Officer's Recommendations and Agency Response:

A public hearing regarding the proposed amendments and new rules was held on February 13, 2013, at the Department of Labor and Workforce Development. David Fish, Regulatory Officer, was available to preside at the public hearing and to receive testimony. No one testified at the public hearing. 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 amendments and new rules without change.

Summary of Public Comments and Agency Responses:

Written comments were submitted by the following individuals. The number(s) in parentheses after each comment identifies the respective commenter(s) listed below.

1. Stefanie Riehl, Assistant Vice President, New Jersey Business and Industry Association, Trenton, New Jersey.
2. John J. Sarno, President, Employers Association of New Jersey, Livingston, New Jersey.
3. Janinne W. Hopkins, HR Compliance Analyst, TD Bank, N.A., Mt. Laurel, New Jersey.
4. Sheila O'Rourke, Vice President for Institutional Effectiveness, Caldwell College, Caldwell, New Jersey.
5. Evan J. Shenkman, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Morristown, New Jersey.

COMMENT: Commenters inquire and/or seek clarification with regard to several aspects of the proposed new rules, which mirror P.L. 2012, c. 57. Specifically, a commenter asks, regarding the requirement that every employer in the State, with 50 or more employees, must post and distribute the notification, what types of employees should be included in this count of 50 or more employees; that is, whether the count should include "part-time, full-time, paid interns, etc." The commenter adds, "suppose there are breaks in employee service throughout the year, as is the case with many seasonal businesses?" A commenter states that the proposed new rules require several distributions of the gender equity notice with signed acknowledgments and asks whether the acknowledgment applies to every required distribution or just the first time the employee receives the notice. A commenter states that the proposed new rules require "that employers receive signed acknowledgments from their employees within 30 days of receiving the notice." The commenter observes that satisfying this requirement may be difficult if employees are not located in the same state as their employers, if they do not have computer access to provide an electronic acknowledgment, or, if employees are temporary workers placed in jobs around the State. The commenter seeks "clarification to address situations where an employer does his or her due diligence, yet still cannot obtain the signed acknowledgment." Regarding the same issue, another commenter suggests that the Department adopt a new section N.J.A.C. 12:2-2.5, entitled "Employer's reasonable efforts," which would state the following: "If a worker does not sign an acknowledgment that he or she has read the notification and understands it, or does not return it to the employer within 30 days of its receipt, the employer is relieved of any responsibility as long as it has exercised reasonable efforts to obtain the signed acknowledgment from the worker." Yet another commenter asks whether a Learning Management System (LMS), which indicates a status of "completed" after the employee reads the notice will suffice, or whether "more of an attestation to a statement that the employee has read and understands the terms [is] required." The commenter also asks whether providing the notification annually in April as part of a company's employee handbook and attestation will suffice to satisfy the annual distribution requirement contained in the new rules and law. Finally, a commenter "respectfully suggests that employers be required to obtain a signed acknowledgment of receipt and understanding of the written notification from all employees and new hires, followed by annual distribution without acknowledgment." (1, 2, 3, and 4)

RESPONSE: The Department's primary responsibility under P.L. 2012, c. 57 is to "issue[] by regulation" the form of notification which must be posted and distributed to employees by covered employers. It is for the purpose of meeting its responsibility under P.L. 2012, c. 57 - that is, the responsibility to make the form of notification available "by regulation," as opposed to simply publishing a form of the notification on the Department's website and/or making hard copy available by mail - that the Department is engaging in this rulemaking. In order to issue the form of notification "by regulation," the Department must attach that form of notification as an appendix to a set of substantive rules. It is for this purpose and this purpose alone that the Department is adopting the new rules at N.J.A.C. 12:2-2. Consequently, the Department has sought to ensure that the new rules hew as closely as possible to the text of P.L.

2012, c. 57.

In light of the foregoing, the Department declines to include a new section, N.J.A.C. 12:2-2.5, entitled "Employer's reasonable efforts," or to address the issue of employer's reasonable efforts through some other change to the proposed new rules, since P.L. 2012, c. 57, says nothing of an employer's "reasonable efforts" to obtain written acknowledgment. Instead, P.L. 2012, c. 57, states that the notification provided by the employer pursuant to N.J.S.A. 34:11-56.12.b (that is, the various distribution requirements, as opposed to the conspicuous posting requirement), "shall contain an acknowledgment that the worker has received the notification and has read and understands its terms," and that the acknowledgment, "shall be signed by the worker, in writing or by means of electronic verification, and returned to the employer within 30 [page=92] days of receipt." New N.J.A.C. 12:2-2.4 states that the notification provided by the employer under N.J.A.C. 12:2-2.3(b) (that is, the various distribution requirements, as opposed to the conspicuous posting requirement), "shall be accompanied by an acknowledgment that the employee has received the notification and has read and understands its terms," and that the acknowledgment in subsection (a) "shall be signed by the employee, in writing or by means of electronic verification, and returned to the employer within 30 days of its receipt." As is clear from the above-quoted statutory and rule text, the two are virtually identical. This was the Department's aim.

Regarding the suggestion that the Department make a change to the proposed new rules that would permit the annual distribution to occur without seeking a written acknowledgment, such a change would be entirely outside the Department's rulemaking authority; which is to say, it would be in direct conflict with the express statutory requirement that each of the notifications distributed to employees under N.J.S.A. 34:11-56.12.b, including the annual distribution of the notification, contain "an acknowledgment that the worker has received the notification and has read and understands its terms."

Regarding the questions posed by commenters, the statute as it is written is sufficiently clear and no changes to the proposed new rules are necessary in order to address the expressed concerns. For example, regarding what constitutes an "employee" for the purpose of determining which employers are covered by the notification requirement (that is, for the purpose of determining which employers have 50 or more employees), P.L. 2012, c. 57, is codified at N.J.S.A. 34:11-56.12, and supplements P.L. 1952, c. 9 (N.J.S.A. 34:11-56.1 et seq.). N.J.S.A. 34:11-56.1 contains definitions for the terms "employee" and "employ." When conducting an employee count for the purpose of determining coverage, the commenter should be guided by those statutory definitions.

Regarding whether the acknowledgment requirement applies to every required distribution under N.J.S.A. 34:11-56.12.b "or just the first time the employee receives the notice," the law states that the notification provided by the employer under N.J.S.A. 34:11-56.12.b must contain the required acknowledgment. N.J.S.A. 34:11-56.12.b covers each of the required distributions of the notice (as opposed to the posting requirement addressed in N.J.S.A. 34:11-56.12.a). The law is unambiguous. It says nothing of requiring an acknowledgment "only for the first time the employee receives the notice." Consequently, there is no reason to believe that the requirement is limited in the manner suggested by the commenter and there is no need for a change to the proposed new rules to address the commenter's concern.

Regarding whether the annual notification can occur in April, again, the law is clear; that is, it states that the annual notification shall occur on or before December 31 of each year. April of each year is, in fact, on or before December 31 of each year. Consequently, there is no reason to believe that an annual April distribution of the notification would run afoul of the law. No change to the proposed new rules is necessary.

Regarding the commenter's use of her "LMS" to distribute the notification and to obtain acknowledgment from employees of having received, read, and understood the notification, the law states that "the acknowledgment shall be signed by the worker, in writing or by means of electronic verification, and returned to the employer within 30 days of its receipt." Without any knowledge of the details of the commenter's "LMS," it is impossible to say whether what has been described constitutes "electronic verification." However, the law is unambiguous. It indicates that if the employer can verify, whether by obtaining a traditional signature or through some electronic means, that the employee received,

read, and understood the notification, then the employer is in compliance. No change to the proposed new rules is necessary.

COMMENT: A commenter suggests that the following sentence should be added to the notification: "Please be mindful that in addition to the rights and remedies provided by the statutes referenced herein, an employee is free to raise concerns directly with his or her employer by notifying _____." (2)

RESPONSE: P.L. 2012, c. 57 requires that the Department issue by regulation a form of notification "detailing the right to be free of gender inequity or bias in pay, compensation, benefits or other terms or conditions of employment under the 'Law Against Discrimination,' P.L. 1945, c. 169 (C.10:5-1 et seq.), P.L. 1952, c. 9 (C.34:11-56.1 et seq.), Title VII of the Civil Rights Act of 1964, Pub.L. 88-352 (42 U.S.C. s.2000e et seq.) and the Equal Pay Act of 1963, Pub.L. 88-38 (29 U.S.C. s.206(d)), which prohibit wage or compensation discrimination based on gender." The statute says nothing of including a reminder within the notification that employees are free to raise concerns directly with their employers. Consequently, the Department declines to make the suggested change to the form of notification.

COMMENT: A commenter suggests that the Department revise the proposed new rules to permit electronic posting and distribution "for **all** Department notifications which must be posted and/or distributed, beyond just the notice/poster detailing the right to be free of gender inequality and bias." (emphasis by commenter) (5)

RESPONSE: As indicated in response to prior comments, the Department's objective with this rulemaking is to issue the form of notification "by regulation," as is required by P.L. 2012, c. 57, and by necessity, to attach the appendix containing the form of notification to a set of substantive rules that mirror the law. What is suggested by the commenter would go beyond the purpose of this rulemaking. Consequently, the Department declines to make the change suggested by the commenter.

Federal Standards Statement

A Federal standards analysis is not required because the adopted amendments and new rules are not subject to any Federal standards or requirements. Specifically, the subject matter of the adopted new rules is governed by P.L. 2012, c. 57.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

SUBCHAPTER 1. NOTIFICATION POSTED BY EMPLOYER PURSUANT TO P.L. 2009, C. 194, RELATING TO EMPLOYER OBLIGATION TO MAINTAIN AND REPORT RECORDS REGARDING WAGES, BENEFITS, TAXES, AND OTHER CONTRIBUTIONS AND ASSESSMENTS UNDER STATE WAGE, BENEFIT, AND TAX LAWS

12:2-1.3 Posting and distribution requirements

(a) Each employer that is required to maintain and report records regarding wages, benefits, taxes, and other contributions and assessments pursuant to the State wage, benefit, and tax laws shall conspicuously post in a place or places accessible to all employees in each of the employer's workplaces the notification found in N.J.A.C. 12:2 Appendix A.

(b) Each employer that is required to maintain and report records regarding wages, benefits, taxes, and other contributions and assessments pursuant to the State wage, benefit, and tax laws shall not later than December 7, 2011, or, if the employee is hired after November 7, 2011, at the time of the employee's hiring, provide each employee a written copy of the notification found in N.J.A.C. 12:2 Appendix A.

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(c) In the event that an employer has an internet site or intranet site for exclusive use by its employees and to which all employees have access, posting of the notification found in N.J.A.C. 12:2 Appendix A on the employer's internet site or intranet site shall satisfy the conspicuous posting requirement set forth in (a) above.

(d) Providing to an employee via email the notification found in N.J.A.C. 12:2 Appendix A shall satisfy the requirement in (b) above, that the employer provide each employee a written copy of the notification.

SUBCHAPTER 2. NOTIFICATION POSTED BY EMPLOYER PURSUANT TO P.L. 2012, C. 57, RELATING TO THE RIGHT TO BE FREE OF GENDER INEQUITY OR BIAS IN PAY, COMPENSATION, BENEFITS, OR TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT

12:2-2.1 Purpose and scope

(a) The purpose of this subchapter is to issue by rule, as required by P.L. 2012, c. 57, the form of notification, which shall be used by [page=93] employers to comply with the requirement, set forth within P.L. 2012, c. 57, that every employer in New Jersey, with 50 or more employees, shall conspicuously post notification, in a place or places accessible to all employees in each of the employer's workplaces, detailing the right to be free of gender inequity or bias in pay, compensation, benefits, or other terms and conditions of employment under the "Law Against Discrimination," P.L. 1945, c. 169 (N.J.S.A. 10:5-1 et seq.), P.L. 1952, c. 9 (N.J.S.A. 34:11-56.1 et seq.), Title VII of the Civil Rights Act of 1964, Pub. L. 88-352 (42 U.S.C. §§ 2000e et seq.), and the Equal Pay Act of 1963, Pub. L. 88-38 (29 U.S.C. § 206(d)), which prohibit wage or compensation discrimination based on gender. In addition, the purpose of this subchapter is to require that every such employer shall provide each employee of the employer with a written copy of the notification: not later than *[(30 days after the effective date of this subchapter)]* ***February 5, 2014***, or if the employee is hired after *[(the effective date of this subchapter)]* ***January 6, 2014***, at the time of the employee's hiring; annually, on or before December 31 of each year; and at any time, upon the first request of the employee.

(b) The provisions of this subchapter shall be applicable to every covered employer.

12:2-2.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise:

"Covered employer" means an employer in New Jersey, which has a total of 50 or more employees, whether those employees work inside or outside of New Jersey.

"Department" means the Department of Labor and Workforce Development.

12:2-2.3 Posting and distribution requirements

(a) Each covered employer shall conspicuously post in a place or places accessible to all employees in each of the employer's workplaces the notification found in N.J.A.C. 12:2 Appendix B.

(b) Each covered employer shall provide each employee a written copy of the notification found in N.J.A.C. 12:2 Appendix B:

1. Not later than *[(30 days after the effective date of this subchapter)]* ***February 5, 2014***, or at the time of the employee's hiring, if the employee is hired after *[(the effective date of this subchapter)]* ***January 6, 2014***;

2. Annually, on or before December 31 of each year; and

3. Upon the first request of an employee.

(c) In the event that an employer has an internet site or intranet site for exclusive use by its employees and to which all employees have access, posting of the notification found in N.J.A.C. 12:2 Appendix B on the employer's internet site or intranet site shall satisfy the conspicuous posting requirement set forth in (a) above.

(d) An employer shall make the written copy of the notification available to each worker under (b) above using one of the following methods:

1. By e-mail delivery;

2. Via printed material, including, but not limited to, a pay check insert; brochure or similar informational packet provided to new hires; an attachment to an employee manual or policy book; or flyer distributed at an employee meeting; or

3. Through an internet or intranet website, if the site is for the exclusive use of all employees, can be accessed by all employees, and the employer provides notice to the employees of its posting.

12:2-2.4 Acknowledgment of receipt

(a) The notification provided by the employer under N.J.A.C. 12:2-2.3(b) shall be accompanied by an acknowledgement that the employee has received the notification and has read and understands its terms.

(b) The acknowledgment in (a) above shall be signed by the employee, in writing or by means of electronic verification, and returned to the employer within 30 days of its receipt.

APPENDIX A

(No change.)

APPENDIX B

Right to be Free of Gender Inequity or Bias in Pay, Compensation, Benefits, or Other Terms and Conditions of Employment

New Jersey and federal laws prohibit employers from discriminating against an individual with respect to his/her pay, compensation, benefits, or terms, conditions or privileges of employment because of the individual's sex.

FEDERAL LAW

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on, among other things, an individual's sex. Title VII claims must be filed with the United States Equal Employment Opportunity Commission (EEOC) before they can be brought in court. Remedies under Title VII may include an order restraining unlawful discrimination, back pay, and compensatory and punitive damages.

The Equal Pay Act of 1963 (EPA) prohibits discrimination in compensation based on sex. EPA claims can be filed either with the EEOC or directly with the court. Remedies under the EPA may include the amount of the salary or wages due from the employer, plus an additional equal amount as liquidated damages.

Please be mindful that in order for a disparity in compensation based on sex to be actionable under the EPA, it must be for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

There are strict time limits for filing charges of employment discrimination. For further information, contact the EEOC at 800-669-4000 or at www.eeoc.gov.

NEW JERSEY LAW

The New Jersey Law Against Discrimination (LAD) prohibits employment discrimination based on, among other things, an individual's sex. LAD claims can be filed with the New Jersey Division on Civil Rights (NJDCR) or directly in court. Remedies under the LAD may include an order restraining unlawful discrimination, back pay, and compensatory and punitive damages.

Another State law, N.J.S.A. 34:11-56.1 et seq., prohibits discrimination in the rate or method of payment of wages to an employee because of his or her sex. Claims under this wage discrimination law may be filed with the New Jersey Department of Labor and Workforce Development (NJDLWD) or directly in court. Remedies under this law may include the full amount of the salary or wages owed, plus an additional equal amount as liquidated damages.

Please be mindful that under the State wage discrimination law a differential in pay between employees based on a reasonable factor or factors other than sex shall not constitute discrimination.

There are strict time limits for filing charges of employment discrimination. For more information regarding LAD claims, contact the NJDCR at 609-292-4605 or at www.njcivilrights.gov. For information concerning N.J.S.A. 34:11-56.1 et seq., contact the Division of Wage and Hour Compliance (DWHC), within the NJDLWD at 609-292-2305 or at <http://lwd.state.nj.us>.