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RULE PROPOSALS

**LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF UNEMPLOYMENT INSURANCE**

49 N.J.R. 3326(a)

Proposed Amendment: *N.J.A.C. 12:17-2.1*

Proposed Repeals: *N.J.A.C. 12:17-10.2 through 10.8*

[Click here to view Interested Persons Statement](#)

Claims Adjudication--Misconduct Connected with the Work

Authorized By: Aaron R. Fichtner, Ph.D., Commissioner, Department of Labor and Workforce Development.

Authority: N.J.S.A. 43:21-7.g.

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

Proposal Number: PRN 2017-244.

A **public hearing** on the proposed amendments and repeals will be held on the following date at the following location:

Tuesday, October 24, 2017
10:00 A.M. to 12:00 Noon
New Jersey Department of Labor and Workforce Development
John Fitch Plaza
13th Floor Auditorium
Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 292-2789 if you wish to be included on the list of speakers.

[page=3327] Submit written comments by December 1, 2017, to:

David Fish, Executive Director
Legal and Regulatory Services
Department of Labor and Workforce Development

PO Box 110, 13th Floor
 Trenton, New Jersey 08625-0110
 Fax: (609) 292-8246
 E-mail: David.fish@dol.nj.gov

The agency proposal follows:

Summary

The Department of Labor and Workforce Development (Department) is proposing amendments to *N.J.A.C. 12:17-2.1*, which are prompted by the recent opinion in *In Re N.J.A.C. 12:17-2.1*, 450 N.J. Super. 152 (App. Div. 2017). In that opinion, the court invalidated that portion of *N.J.A.C. 12:17-2.1* that defines the term, "simple misconduct," explaining, "[w]e do so because the definition illogically and confusingly mixes in concepts of 'negligence' with intent-based concepts such as 'willful disregard,' 'evil design,' 'wrongful intent,' and similar states of mind." The court added, "[t]he regulation is also flawed because ... it defines 'simple misconduct' in certain respects as encompassing conduct that is at least as extreme or venal-or perhaps more so-than 'severe misconduct'." Having invalidated the Department's regulatory definition for the term, "simple misconduct," on these bases, the court concluded as follows:

Although we have pondered whether to perform "judicial surgery" on the wording of the regulation ourselves to solve these problems, we consider it more appropriate for the Department to go back to the proverbial drawing board and develop a clearer and more cogent alternative itself, considering the input of appellants and any other commenters.

Thus, taking into consideration the court's opinion, the Department proposes the following:

(1) Within the definition of the term, "simple misconduct," that the current language, "negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer," be replaced with the following language, "negligence in such recurrence as to manifest culpability, or an act that is reckless;" and that a new paragraph be added to the definition of "simple misconduct," stating the following, "[f]or an act to be reckless it must be such as to evince a disregard of, or indifference to, consequences, under circumstances involving potential injury or harm to another or others, although there was no intent to cause injury or harm to another or others."

(2) Within the definition of the term, "simple misconduct," remove the words "wanton or" from the phrase, "which is an act of wanton or willful disregard of the employer's interest,"

(3) Within the definition of the term, "malicious," remove the phrase, "or when an act is substantially certain to cause injury or harm to another or others," so that the definition of the term, "malicious," simply reads, "when an act is done with the intent to cause injury or harm to another or others,"

(4) Within the definition of "simple misconduct," add a list of certain types of conduct that are not considered "simple misconduct," namely, (a) inefficiency, unsatisfactory conduct, or failure to perform well as a result of inability or incapacity; (b) inadvertence or ordinary negligence in isolated instances; or (c) good faith errors in judgment or discretion, and

(5) Within the definition of "severe misconduct," create two categories: (1) acts which are enumerated at *N.J.S.A. 43:21-5* (amended by P.L. 2010, c. 37) as constituting "severe misconduct," which, as a condition to being considered "severe misconduct," would first be required to meet the definition of "simple misconduct" (as required by the holding in *Silver v. Board of Review*, 430 N.J. Super. 44 (App. Div. 2013)) and would not be acts constituting "gross misconduct"; and (2) acts which are not those enumerated at *N.J.S.A. 43:21-5* (amended by P.L. 2010, c. 37), which as a condition to being considered "severe misconduct," would first be required to meet the definition of "simple misconduct" (as required by the holding in *Silver v. Board of Review*, *supra.*), would also have to be both deliberate and malicious, and finally, would not be acts constituting "gross misconduct."

The first of these three changes would eliminate the supposed "mix[ing] in" of concepts of negligence with "intent-based concepts such as 'willful disregard,' 'evil design,' 'wrongful intent,' and similar states of mind," in that each of those phrases would literally be removed from the definition as would the concept of negligence "in such degree," etc., leaving only negligence "in such **recurrence** as to manifest culpability" (emphasis added), or an act that is "reckless;" which is to say, an act (neither negligent, nor intentional) that evinces a disregard of, or indifference to, consequences, under circumstances involving potential injury or harm to another or others, although there was no intent to cause injury or harm to another or others. This, coupled with the third of the three changes described above, namely, the Depart-

ment's proposed removal from the definition of "malicious" of the phrase, "or when an act is substantially certain to cause injury or harm to another or others;" resulting in a definition of "malicious" that includes only acts done with the intent to cause injury or harm to another or others, would, it is hoped, result in the demarcation between "simple misconduct" and "severe misconduct" sought by the court.

Regarding the second of the three changes described above, examining the entire definition for the term "simple misconduct" with an eye toward achieving the sort of clarity sought by the court, the Department believes that it would be appropriate to remove the words "wanton or" from before "willful" when speaking of an employee's disregard of his or her employer's interest constituting "simple misconduct;" since use of the word, "wanton," which means deliberate and unprovoked, may confuse. Which is to say, "willful" and "deliberate" are synonymous and, so, if "willful" is separated within the existing definition from "wanton" by an "or," then if an employee's disregard of an employer's interest is willful, whether or not unprovoked, the act would constitute "simple misconduct;" thus, making the words "wanton or" superfluous. Furthermore, to the degree that one might read "wanton" to be at all akin to "malicious," its inclusion within the definition of "simple misconduct" may give rise to the sort of confusion described by the court. Consequently, in the Department's reasoned judgment, the definition of "simple misconduct" is cleaner when the concept of "wanton" behavior is removed from the mix and the focus is squarely on whether the disregard of an employer's interest was willful (in other words, deliberate).

With regard to the fourth of the above listed changes, in the seminal opinion in *Beaunit Mills, Inc. v. Board of Review*, 43 N.J. Super. 172 (App. Div. 1956), the court adopted a definition for the term "misconduct," which the Department had earlier sought to adopt through regulation. The *Beaunit Mills* court also indicated within its opinion what it believed should not be included within "misconduct," namely, mere mistakes, errors in judgment or in the exercise of discretion, minor but casual or unintentional carelessness or negligence and similar minor peccadilloes; adding that "misconduct" also cannot mean mere inefficiency, unsatisfactory, failure to perform as the result of inability or incapacity, inadvertence in isolated instances, or good faith errors of judgment. The Department has always agreed with this description by the *Beaunit Mills* court of what does not constitute "misconduct" (whether simple, severe, or gross). During the oral argument in *In Re N.J.A.C. 12:17-2.1*, supra., the court made specific reference to this portion of the *Beaunit Mills* opinion and suggested that including some language akin to this within the Department's definition of "simple misconduct," might be helpful. Finally, the Department conducted an informal survey of the laws and regulations of other states and found some instances of states having adopted regulatory language indicating what does not constitute "misconduct;" language very similar to that [page=3328] used by the *Beaunit Mills* court. In light of the foregoing, the Department has determined that it would be worthwhile to include this sort of language within its regulatory definition of the term, "simple misconduct."

Regarding the fifth change listed above, in the course of its re-examination of the definition of "simple misconduct;" specifically, as it relates to the definition of "severe misconduct," the Department is proposing that the existing definition of "severe misconduct" be changed so as to ensure its consistency with *N.J.S.A. 43:21-5*, as amended by P.L. 2010, c. 37. That is, it occurred to the Department during its post-*In Re N.J.A.C. 12:17-2.1* examination of the rules, that the existing regulatory definition of "severe misconduct" erroneously requires that in order for those acts expressly listed at *N.J.S.A. 43:21-5* to be considered "severe misconduct," they must also be found to have been both deliberate and malicious. However, the law does not state this. Rather, the law states that each of the expressly enumerated acts constitutes "severe misconduct," without any reference to the deliberate or malicious nature of the acts, and then adds that "where the behavior is malicious and deliberate but is not considered gross misconduct," such acts will also constitute "severe misconduct." In fact, the enumerated behaviors and the latter phrase regarding behavior that is malicious and deliberate are separated by the word "or." Thus, it would be inappropriate to apply the "deliberate and malicious" requirement to the enumerated examples. Importantly, pursuant to *Silver, supra*, any act, including those described in the enumerated examples, must meet the threshold test for "simple misconduct," before it may be considered "severe misconduct." Consequently, the Department is proposing, as described above, that there be two separate tracks to establish that an act constitutes "severe misconduct." The first track, where an act is listed among those enumerated at *N.J.S.A. 43:21-5* as an example of "severe misconduct," the rule would require that in order to be considered "severe misconduct," the only prerequisites beyond the act's inclusion on the statutory list would be that (1) the act meet the definition of "simple misconduct" and (2) it not constitute "gross misconduct." The second track, where an act is not listed among those enumerated at *N.J.S.A. 43:21-5* as an example of "severe misconduct," the rule would require that in order to be considered "severe misconduct," the act must (1) meet the definition of "simple misconduct," (2) be both deliberate and malicious, and (3) not constitute "gross misconduct."

In addition, the Department is proposing to repeal *N.J.A.C. 12:17-10.2* through *10.8*, which address various types of discharge or suspension from employment. For example, *N.J.A.C. 12:17-10.2* addresses discharge or suspension for unauthorized absence; *N.J.A.C. 12:17-10.3* addresses discharge or suspension for tardiness; and *N.J.A.C. 12:17-10.4* addresses discharge of suspension for falsification of application or other records. These particular rules were promulgated during the pre-2010 era when there were simply two forms of misconduct: "misconduct" and "gross misconduct." With the introduction through the 2010 legislation of an intermediate level of misconduct known as "severe misconduct," it is the Department's reasoned judgment that these particular scenario specific rules may no longer be useful and, in fact, may actually confuse claimants, employers, and Departmental staff.

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

Social Impact

It is the Department's belief that the proposed amendments and repeals would have a positive social impact in that they would minimize any possible confusion as to when and how a claimant for unemployment compensation is disqualified for benefits, pursuant to the Unemployment Compensation Law, *N.J.S.A. 43:21-1* et seq., and *N.J.A.C. 12:17-10*, when the individual has been suspended or discharged for misconduct connected with the work.

Economic Impact

It is the Department's belief that the proposed amendments and repeals would have a positive economic impact in that they would minimize any possible confusion as to when and how a claimant for unemployment compensation is disqualified for benefits, pursuant to the Unemployment Compensation Law, *N.J.S.A. 43:21-1* et seq., and *N.J.A.C. 12:17-10*, when the individual has been suspended or discharged for misconduct connected with the work. It is the Department's hope that minimizing confusion as to these issues will avoid costs for claimants and employers of unnecessary litigation, which might otherwise result.

Federal Standards Statement

The proposed amendments and repeals do not exceed standards or requirements imposed by Federal law. Specifically, the proposed amendments and repeals are not inconsistent with the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301 et seq. Consequently, no Federal standards analysis is required.

Jobs Impact

The proposed amendments and repeals would have no impact on either the generation or loss of jobs.

Agriculture Industry Impact

The proposed amendments and repeals would have no impact on the agriculture industry.

Regulatory Flexibility Statement

The proposed amendments and repeals would impose no reporting, recordkeeping, or compliance requirements on small businesses, as that term is defined by the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16* et seq. Outside the realm of reporting, recordkeeping, or compliance, as described in the Summary above, the proposed amendments and repeals would reword and somewhat reconfigure the definitions of "simple misconduct," "severe misconduct," and "malicious," with the intent to address the concerns expressed by the court in the recent opinion in *In Re N.J.A.C. 12:17-2.1*, 450 N.J. Super. 152 (App. Div. 2017), while also remaining true to the controlling statute, *N.J.S.A. 43:21-1* et seq., amended in 2010 to include the concept of "severe misconduct," and while adhering to the dictate of the court in *Silver v. Board of Review*, 430 N.J. Super. 44 (App. Div. 2013). It is unknown precisely what impact, if any, the proposed amendments might have on businesses, including small businesses. However, it is in the best interests of all concerned--claimants, employers (large and small), and Department staff--that there are regulatory definitions for the terms at issue, which are clear and which meet with the court's approval. Employers should not require outside professional services to comply with the proposed amendments and repeals.

Housing Affordability Impact Analysis

The proposed amendments and repeals would not evoke a change in the average costs associated with housing, nor would they have any impact on the affordability of housing in the State. The basis for this finding is that the proposed amendments and repeals pertain to the definitions of various types of misconduct, and have nothing to do with housing.

Smart Growth Development Impact Analysis

The proposed amendments and repeals would not evoke a change in housing production within Planning Areas 1 and 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed amendments and repeals pertain to the definitions of various types of misconduct, and have nothing to do with housing production.

Full text of the rules proposed for repeal may be found in the New Jersey Administrative Code at *N.J.A.C. 12:17-10.2* through *10.8*.

Full text of the amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 2. DEFINITIONS

12:17-2.1 Definitions

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

...

[page=3329]"Malicious" means when an act is done with the intent to cause injury or harm to another or others [or when an act is substantially certain to cause injury or harm to another or others].

...

"Severe misconduct" means an act which (1) constitutes "simple misconduct," as that term is defined in this section; [(2) is both deliberate and malicious; and (3)] **(2) is not "gross misconduct[.]"**; **and (3) is either both deliberate and malicious or one the following: repeated violations of an employer's rule or policy; repeated lateness or absences after a written warning by an employer; falsification of records; physical assault or threats that do not constitute "gross misconduct"; misuse of benefits; misuse of sick time; abuse of leave; theft of company property; excessive use of intoxicants or drugs on work premises; or theft of time.**

[1. Pursuant to *N.J.S.A. 43:21-5*, as amended by P.L. 2010, c. 37, such acts of "severe misconduct" shall include, but not necessarily be limited to, the following: repeated violations of an employer's rule or policy, repeated lateness or absences after a written warning by an employer, falsification of records, physical assault or threats that do not constitute "gross misconduct," misuse of benefits, misuse of sick time, abuse of leave, theft of company property, excessive use of intoxicants or drugs on work premises, or theft of time; except that in order for any such act to constitute "severe misconduct," it must also (1) constitute "simple misconduct"; and (2) be both deliberate and malicious.]

"Simple misconduct" means an act which is neither "severe misconduct" nor "gross misconduct" and which is an act of [wanton or] willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior that the employer has the right to expect of his or her employee, [or] negligence in such [degree or] recurrence as to manifest culpability, [wrongful intent, or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.] **or an act that is reckless.**

1. For an act to be reckless it must be such as to evince a disregard of, or indifference to, consequences, under circumstances involving potential injury or harm to another or others, although there was no intent to cause injury or harm to another or others.

"Simple misconduct" does not include:

- i. Inefficiency, unsatisfactory conduct, or failure to perform well, as the result of inability or incapacity;**
- ii. Inadvertence or ordinary negligence in isolated instances; or**
- iii. Good faith errors in judgment or discretion.**

Nothing contained within this definition should be construed to interfere with the exercise of rights protected under the National Labor Relations Act or the New Jersey Employer-Employee Relations Act.

...