23-2419

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

NEW JERSEY STAFFING ALLIANCE; AMERICAN STAFFING ASSOCIATION; NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION,

Plaintiffs-Appellants,

—v.—

CARI FAIS, Acting Director of the New Jersey Division of Consumer Affairs in the Department of Law and Public Safety; STATE OF NEW JERSEY; ROBERT ASARO-ANGELO, Commissioner of Labor and Workforce Development; NEW JERSEY DIVISION OF CONSUMER AFFAIRS IN THE DEPARTMENT OF LAW AND PUBLIC SAFETY; NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR PLAINTIFFS-APPELLANTS AND JOINT APPENDIX VOLUME I OF II (Pages A1 to A31)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, a disclosure statement is required to be filed by any nongovernmental corporate party that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or stating there is no such corporation.

New Jersey Staffing Alliance, American Staffing Association, and New Jersey Business and Industry Association are not for profit organizations which do not have shareholders.

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JURISDICTIONAL STATEMENT

Plaintiffs appeal an Order entered by the District Court on July 26, 2023, denying their application for a preliminary injunction and a temporary restraining order.

The District Court has subject matter jurisdiction of this case pursuant to 28 U.S.C. §1331, asserting, among other things, claims arising under the U.S. Constitution. The Complaint asserts that New Jersey Legislation violates the U.S. Constitution in several respects including, inter alia: the Dormant Commerce Clause and the Due Process clause of the 14th Amendment (due to vagueness and unlawful exercise of police power).

Plaintiffs timely filed a Notice of Appeal in the District Court on August 3, 2023 from the District Court's Order of July 26, 2023 denying preliminary injunctive relief. The Order is an interlocutory decision. This Court has jurisdiction for the appeal of that interlocutory decision pursuant to 28 U.S.C. §1292(a)(1).

STATEMENT OF THE ISSUES

Q. Whether in denying the application for emergency injunctive relief prohibiting operation and enforcement of N.J.S.A. 34:8D-1 *et seq*. (the "Legislation"), the District Court erred? (A2-31, A40-64)

A. Have Plaintiffs established probability of success that the Legislation is unconstitutional by virtue of violating the Dormant Commerce Clause, or the Due Process Clause as being void for vagueness, or the Due Process Clause as being an unreasonable exercise of police power? (A2, A16-31, A40-64)

B. Have Plaintiffs, as the District Court found, established irreparable harm? (A11-16, A40-64)

C. Have Plaintiffs established the balance of harm and public interest support injunctive relief? (A30-31, A40-64)

D. Have Plaintiffs established the District Court abused its discretion in denying injunctive relief? (A2-31, A40-64)

RELATED CASES AND PROCEEDINGS

Plaintiffs are unaware of any related cases and proceedings.

STANDARD OF REVIEW

The standard of review for the denial of preliminary injunction is as follows: this Court reviews the District Court's findings of fact for clear error, its conclusions of law *de novo*, and the ultimate decision, for an abuse of discretion. Reilly v. City

of Harrisburg, 858 F.3d 173, 176 (3d Cir. 2017); Kimden-Ouaffo v. Task Mgmt., 792 Fed. Appx. 218, 221 (3d Cir. 2019).

STATEMENT OF THE CASE

Plaintiffs are associations whose members include entities which provide certain classifications of temporary employees to their third-party clients. A42-43. Plaintiffs seek to enjoin the operation and enforcement of the "Temporary Workers' Bill of Rights", N.J.S.A. 34:8D-1 et seq. (the "Legislation"). A1, A2-30. Add. 1-30. Some parts of the Legislation went into effect on May 7, 2023. A48. Other sections, including N.J.S.A.34:8D-7(b), went into effect on August 5, 2023. Id. N.J.S.A. 34:8D-7(b) imposes requirements upon Plaintiffs' members and their clients for the amount of wages to be paid to temporary employees. A52, Add. 16-17.

On May 5, 2023, Plaintiffs filed a complaint by order to show cause challenging the constitutionality of the Legislation, alleging, inter alia, that it was so vague that Plaintiffs, and their customers, did not know how to comply with it, that it violated the Dormant Commerce Clause, and that it was an unlawful exercise of the police power. A40. Plaintiffs sought temporary and preliminary injunctive relief. A93.

The District Court issued a written opinion and order on July 26, 2023 denying Plaintiffs' application for injunctive relief. A2-31. Though the District Court

found the Plaintiffs had sufficiently established irreparable harm, the Court found they had not established probability of success on the merits. A11-29.

Plaintiffs filed a notice of appeal on August 3, 2023. A1. Plaintiffs filed motions in the District Court and this Court for an injunction and stay pending appeal. A38, 3d Cir. Dkt. Entry 12. Those motions were denied. A38, 3d Cir. Dkt. Entry 16.

Plaintiffs assert the Legislation violates the Dormant Commerce Clause by imposing New Jersey law upon out-of-state firms, resulting in pricing discrimination that contravenes longstanding Supreme Court of the United States precedents. A57-60, A96-203. Plaintiffs further assert the Legislation is unconstitutionally vague, imposing indecipherable pay requirements that invite arbitrary enforcement. A58. Proposed regulations interpreting these requirements, Add. 31-83, compound the problem of arbitrary enforcement. A272-273. The Legislation is also an unreasonable exercise of police power because it arbitrarily interferes with private businesses and imposes unusual and unnecessary restrictions on lawful businesses. A59.

The Temporary Staffing Industry

Temporary staffing companies provide temporary employees to third-party clients to service the needs of those third-party clients. A45-48. Third-party clients often need short-term labor to complete a project, and they may lack the necessary

time and manpower to interview, hire and complete the administrative paperwork to secure new employees. A46-47. Staffing companies fill this void by providing temporary laborers the staffing companies have already recruited and vetted, and for whom the staffing companies complete all the required paperwork, administration and human resources functions. Id.

Without the assistance of staffing companies and the laborers they provide, many third-party clients (particularly small ones), could not compete in the marketplace. Temporary staffing companies have responsibility for addressing all administrative matters, such as paying the workers' wages, obtaining and maintaining appropriate Workers' Compensation Insurance, attending to unemployment insurance obligations, performing payroll services, and withholding and paying all applicable taxes. A47.

The third-party client determines the workers' daily work hours and their specific job duties. Temporary staffing companies charge third-party clients for their services by submitting an invoice. Third-party clients are required under the Legislation to pay staffing agencies the amount of wages and benefits paid to the workers without any ability of the third-party clients to negotiate lower fees to be paid to the staffing agencies. Id., N.J.S.A. 34:8D-6(h), Add. 15. The invoice covers the staffing companies' costs of finding, recruiting and vetting the employees, in addition to taking care of all employer obligations such as paying the employees'

wages and related taxes, providing workers' compensation and unemployment insurance, the general and administrative expenses of operating its business, plus a profit element. A47.

Third-party clients are willing to pay the staffing companies in return for the flexibility of obtaining labor only as needed and to avoid the administrative burden of recruiting and hiring workers to their own payroll when the worker may be employed on a project for only a few days. A48.

The temporary staffing industry provides a significant employment contribution to the workplace in the State of New Jersey. Id. Temporary staffing companies employed over 510,000 workers in New Jersey in 2021. Id. The highest temporary help occupation groups in New Jersey have been transportation and material moving (38%), office and administrative support (14%), production (10%), healthcare practitioners and technical (7%) and business and financial operations (6%). Id.

The Legislation

A major focus of Plaintiffs' application for injunctive relief was N.J.S.A. 34:8D-7(b), which provides:

> Any temporary laborer assigned to work at a third-party client in a designated classification placement shall not be paid less than the average rate of pay and average cost of benefits, or the cash equivalent thereof, of employees of the third-party client performing the same or substantially similar work on jobs the performance of which requires

> equal skill, effort, and responsibility, and which are performed under similar working conditions for the third- party client at the time the temporary laborer is assigned to work at the third-party client. Each violation of this subsection for each affected temporary laborer shall constitute a separate violation under section 11 [N.J.S.A. 34:8D-11].

Subsection (c) imposes a $5,000 civil penalty for violation of Section 7. Subsection (d) makes the staffing company and the third-party client jointly and severally liable for the violation. A52, Add. 16-17.

The Proposed Regulations

On July 21, 2023, public notice was issued regarding proposed regulations (the "Notice") which, inter alia, purportedly inform staffing companies how to calculate average rates of pay and costs of benefits. Add. 31-83, A270-271. As will be discussed infra, the District Court determined the proposed regulations, and the opportunity afforded to the staffing industry to comment upon them, provided a panacea to the ills presented by the Legislation. A25-26. In fact, they do not. A272-273.

The Harm Caused by the Legislation

The Declarations submitted by the Plaintiffs support the proposition that third-party clients are unwilling to provide wage and benefit information necessary to make calculations required by the Legislation out of competitive concerns. A32, A80, A90-91, A137, A140, A143, A146-147. They further establish that third-party

clients will not utilize New Jersey staffing entities due to vagueness of the Legislation and the joint and several liability imposed. A65-92, A136-167. Third-party clients are also declining to use staffing companies because their existing employees will not accept a temporary worker receiving higher wages than full-time employees of the third-party client are paid. A143-A150.

More specifically, staffing company TeleSearch declares that its top 10 industrial clients, producing almost $10 million in revenues, will cancel its services, and that with this loss of revenues, it will not be able to continue operations. A163. ProStaff Workforce Solutions is losing clients producing $8,700,000 in revenues, and with this loss it will close operations. A167. Staffing Alternatives is losing clients producing over $50 million in revenues. A160. United Temporary Services is losing clients producing $28 million in revenues. A155.

The Declaration of Edward Damm, from Accu Staffing Services, further establishes that the existential losses referenced above are representative of the entire New Jersey company staffing industry, as the District Court below noted. A156-158, A11-16.

SUMMARY OF THE ARGUMENT

The District Court properly held that Plaintiffs established the irreparable harm likely to follow implementation of the Legislation. The District Court reached erroneous legal conclusions, however, regarding, inter alia, violations of the Dormant Commerce Clause and the Due Process Clause by the Legislation. The District Court's factual findings and legal conclusions in denying Plaintiffs' preliminary injunction application incorrectly characterized the salient provisions and the significant interpretive and enforcement problems of the Legislation, leading to mass confusion in the temporary staffing industry and arbitrary enforcement.

The District Court, among other things, erroneously concluded that the Legislation was not a pricing discrimination statute violating the Dormant Commerce Clause. New Jersey has imposed upon out-of-state companies a temporary worker minimum wage for workers coming from New Jersey. This is unconstitutional price setting, preventing out of state companies from negotiating lower wages when utilizing New Jersey temporary staffing companies. The Legislation unlawfully imposes requirements on out-of-state companies, regulating the price to be paid for New Jersey laborers employed there, and requires out-of-state companies to provide pricing and other information. The Legislation invites price gridlock, unconstitutionally burdening interstate commerce.

The District Court also legally erred by failing to conclude that the Legislation was unconstitutionally vague as to the pay and benefits provisions. The Legislation provides no definitions explaining how the industry may make calculations. The Legislation fails to provide any understandable standard for identifying comparator employees or calculating their pay and benefits. The proposed regulations likewise do not answer fundamental questions about how to calculate pay, benefits, their cash equivalent and identify comparator employees. There are an infinite number of potential factors, bespeaking a standardless measure from which the New Jersey Department of Labor and Workforce Development (the "Department") can pick and choose for enforcement. The District Court's factual and legal determinations otherwise were error.

Further, the District Court erred in finding that the Legislation was a lawful exercise of police power because, even assuming its objectives were reasonable, the means selected to achieve those means were unreasonable and oppressive.

While the District Court did not reach the injunction factors addressing the public interest and potential harm to other interested parties, the record supports an injunction here. Enjoining the Legislation and its enforcement will serve the public interest by preventing enormous disruption within the industry and preventing the likely decimation of companies and the associated employment of thousands of temporary staffing workers whose rights the Legislation was meant to enhance. The

District Court's denial of an injunction in these circumstances was an abuse of discretion.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING INJUNCTIVE RELIEF BARRING THE OPERATION AND ENFORCEMENT OF THE LEGISLATION.

A. Plaintiffs Have Established a Likelihood of Success on the Merits of Their Claims.

1. The Legislation Violates the Dormant Commerce Clause.

The Legislation is the first of its kind in the nation to require an out-of-state company to comply with another State's labor laws for temporary laborers, as well as requiring businesses to perform a comparator analysis between employees of *different* companies to ascertain the required minimum pay. Although Defendants assert the Legislation is non-protectionist, as incorrectly concluded by the District Court, New Jersey cannot establish laws required to be used in other States. New Jersey likewise cannot prohibit out-of-state companies from negotiating labor prices between New Jersey and out-of-state competitors. Were other States to enact their own versions of the Legislation enforceable in New Jersey, requiring their citizens to be paid more than New Jersey's, or guaranteeing a different payment of benefits, there would be a labor price war – pricing gridlock - involving labor between the States. The Dormant Commerce Clause bars States from such extraterritorial pricing.

a. The District Court Improperly Applied the Supreme

Court of the United States Decision in National Pork Producers Council v. Ross

In reaching the conclusion that Plaintiffs had not established the likelihood of success on their claim that the Legislation violated the Dormant Commerce Clause, the District Court relied heavily on the recent Supreme Court of the United States decision in National Pork Producers Council v. Ross, 598 U.S. 356, 143 S.Ct. 1142 (2023) decided after the filing of the complaint in this case. A17-22. The District Court's analysis and application of that decision, however, missed the mark. This resulted in the District Court's incorrect decision that Plaintiffs could not show a likelihood of success on the merits.

In National Pork, an association of pork producers challenged Proposition 12, adopted by California voters, which directed how pork sold in California would be produced, even if produced out of state. Only a small percentage of pork sold in California was raised there, and since an out-of-state pork grower or processor would have no idea whether pork product grown or processed would end up in California, the out-of-state grower or processor would have to either comply with the California law with regard to all pork, or not sell its product in California.

National Pork did not involve discrimination against interstate commerce or protectionism; it involved product originating out-of-state but sold in state. This case, insofar as the interstate commerce issue is concerned, involves a product (labor) originating in-state and sold out-of-state. This difference is material because Justice

Gorsuch, who authored the opinion cited by the District Court, relied heavily upon a state's traditional ability to regulate product sold within its borders, not the inverse where product from within the state is sold out-of-state. 143 S.Ct. at 1150.

The District Court stated:

> However, the National Pork court has rendered the "exterritoriality doctrine" a dead letter; extraterritorial effects alone are no longer sufficient to show a violation of the Commerce Clause…. Instead Plaintiffs now must demonstrate that a law amounts to "purposeful discrimination against out-of-state commerce". A18.

It is respectfully submitted that the District Court did not correctly apply National Pork since it failed to recognize that, even under Justice Gorsuch's opinion, the Legislation violates the Dormant Commerce Clause because the Legislation is a pricing discrimination statute. The Legislation protects wages of New Jersey temporary workers providing services outside the state by preventing these out-of-state third-party clients from negotiating lower wages.

b. The Baldwin, Healy and Brown-Forman Line of Cases Support Plaintiffs' Dormant Commerce Clause Claims.

This case is akin to the price setting or price affirming cases of Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), Healy v. Beer Institute, 491 U.S. 324 (1989), and Brown-Forman Distillers Corp. v. New York Statute Liquor Auth., 476 U.S. 573 (1989) which Justice Gorsuch *distinguished* from the facts in National Pork.

Further, and significant to ascertaining the scope of the plurality decision in National Pork, Justice Gorsuch found that the petitioners in National Pork had not sufficiently pled substantial harm to interstate commerce, which he found was "nothing more than a speculative possibility". This is another way in which National Pork is distinguishable from the instant case. There is actual damage here, beyond speculation. The Declaration of David Hayes, a Pennsylvania customer of a New Jersey temporary staffing agency, amply establishes the adverse impact on interstate commerce. A142-144.

It is clear that the ruling of the Court in National Pork was very narrow; the Plaintiffs' pleading in that case was inadequate. It is equally clear that a majority of Justices held that *discrimination* against interstate commerce is not an *absolute necessity* for a Dormant Commerce Clause violation. The District Court's statement, at A18, that "National Pork has rendered the extraterritorial doctrine a dead letter," is contrary to the views of the majority of Justices.

A clear majority of Justices continue to approve the extraterritoriality doctrine set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), as is evident from the separate concurring and dissenting opinions representing the opinions of six Justices. In an opinion by Justice Sotomayor, concurring in part, joined by Justice Kagan (143 S.Ct. at 1165), that Justice noted that courts entertain challenges based on the Dormant Commerce Clause even if enactment was not discriminatory, rejecting any

reworking of Pike. Id. at 1165-1166. In a concurring and dissenting opinion by Chief Justice Roberts, joined by Justices Alito, Kavanaugh and Jackson (143 S.Ct. at 1167), the Chief Justice reaffirmed Pike's holding that non-discriminatory enactments can violate the Dormant Commerce Clause. Id.

Suppose that Pennsylvania refuses to accept that a New Jersey temporary worker providing services for a Pennsylvania third-party client must, as a result of the Legislation, receive higher wages than a Pennsylvania temporary worker working for the same third-party client, or, higher than a long tenured full-time employee of the client. Suppose Pennsylvania, in response, enacts retaliatory Legislation requiring that its residents, whether a temporary worker or a full-time employee, be paid *more than* the New Jersey temporary workers. A price war for laborers will result. This sort of interstate trade war – with its resulting barriers to interstate commerce - is precisely what the Dormant Commerce Clause was intended to prevent.

The pricing discrimination under the Legislation is understood in the context of those decisions. In Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935), New York prohibited in-state sales of milk purchased out-of-state, unless the price paid to the out-of-state producer was the same paid to New York producers. Vermont producers were offering milk for a substantial discount. The Court found "New York has no power to project its legislation into Vermont by regulating the price to be paid

in that state for milk acquired there." Id. at 521. The Court prohibited New York from outlawing the milk's later sale in New York, unlawfully enacting customs barriers between states, beyond the power of the States. Id. at 522.

Justice Gorsuch noted that in Baldwin, the "challenged laws deliberately robbed out-of-state dairy farmers of the opportunity to charge lower prices in New York …". Id. Here, the Legislation deprives out-of-state clients of the opportunity to pay less for New Jersey temporary staffing.

The same analysis applies with respect to the price affirmation enactments in Healy and Brown-Forman.

In Healy v. Beer Institute, Inc., 491 U.S. 324 (1989), Connecticut required out-of-state beer shippers to affirm their Connecticut sales prices were no higher than the prices sold within neighboring states. The statute unconstitutionally required out-of-state sellers to consider Connecticut pricing, restricting their ability to offer pricing discounts. The Commerce Clause prohibits States from forcing out-of-state merchants "to seek regulatory approval in one state before undertaking a transaction in another." Id. at 337. The practical effect of such laws would lead to competing state laws and "price gridlock". Id. at 340. National regulation of pricing regulations is left to the Federal Government. Id.

In Brown-Forman v. New York State Liquor Authority, 476 U.S. 573 (1986), the Court struck down a New York law requiring liquor distillers from selling above

the lowest price offered out-of-state. The statute improperly required out-of-state consumers to surrender competitive pricing advantages. Id. at 580. "Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States." Id.

The reasoning behind these cases exists post-National Pork. Writing the Opinion of the Court, Justice Gorsuch stated in National Pork:

> And when it comes to *Baldwin, Brown-Forman and Healy* . . . Throughout the Court explained that the challenged statutes had a specific impermissible "extraterritorial effect"-they deliberately "prevent[ed out-of-state firms] from undertaking competitive pricing" or "deprive[d] businesses and consumers in other States of 'whatever competitive advantages they may possess.'" (citations omitted)
>
> In recognizing this much, we say nothing new. This Court has already described "[t]he rule that was applied in *Baldwin* and *Healy*" as addressing "price control or price affirmation statutes" that tied "the price of . . . in-state products to out-of-state prices."

598 U.S. 356, 143 S. Ct. at 1155.

With respect to the above trilogy of cases, Justice Gorsuch further stated, "throughout, the Court explained that the challenged statutes had a *specific* impermissible 'extraterritorial effect' they deliberately 'prevent[ed] out-of-state firms] from undertaking competitive pricing' or 'deprive[d] businesses and consumers in other states of 'whatever competitive advantage they may possess.'"

1435 Ct. at 1155 (italics in original). So too with the Legislation. See also Freeman v. Corzine, 629 F.3d 146 (3rd Cr. 2010), where this Court invalidated state laws that allowed in-state, but not out-of-state wineries to sell directly to consumers, and limited the quantities of out-of-state wine imported for personal consumption, in violation of the Dormant Commerce Clause.

c. The Legislation Adversely Impacts Out-of-State Entities

There can be no doubt as to the impacts of the Legislation upon out-of-state entities. The Department has made clear in both the Notice, Add. 31-83, and its current, published guidance that: when the temporary laborer employed by a temporary help service firm that is located, operates, or transacts business within New Jersey is assigned to work in a designated classification placement **outside of New Jersey**, the temporary laborer is entitled to the rights and protections enumerated in the law if the temporary laborer's primary residence is in New Jersey. New Jersey Department of Labor and Workforce Development, "Temporary Workers in NJ: Rights and Protections Frequently Asked Questions." *Available at* https://www.nj.gov/labor/worker-protections/myworkrights/temporary workers.shtml (accessed November 10, 2023 1:27 p.m.).

Thus, a company located in Pennsylvania or Delaware, utilizing temporary workers whose primary residence is New Jersey, have now become subject to compliance with the Legislation, including the price setting requirements. This most

clearly runs afoul of the Supreme Court precedents cited above.

The District Court also erred in concluding out-of-state companies are not somehow disadvantaged by the Legislation. A20-21. It is simply inaccurate, as asserted by the Declaration of David Hayes, plant manager of Rogers Foam Corporation located in Pennsylvania. A142-144. Out-of-state businesses are burdened as they are forced to surrender whatever availing cost advantages they might enjoy in Pennsylvania of a laborer in Pennsylvania who merely resides in New Jersey. The Act disadvantages out-of-state companies by limiting their ability to negotiate the best pricing between companies in those two States and to find the best laborers. Out-of-state companies cannot, as Defendants claim, "leverage any cost advantages to its New Jersey competitors," Defendants' Opposition to Motion for Injunction Pending Appeal, 3d Cir. Dkt. Entry 14 at 11, because there can be no unregulated negotiations under the Legislation. New Jersey sets minimum pricing for those out-of-state companies by requiring pay equity and other rules.

Impacting such pricing determinations is the gravamen of a Dormant Commerce Clause violation. The Legislation imposes a tariff on the labor sent out-of-state by restricting pricing for that labor. The result can be pricing gridlock.

d. <u>The District Court Erred in Its Legal Conclusions Surrounding the Dormant Commerce Clause.</u>

The District Court thus erred in its conclusion that Plaintiffs are unlikely to succeed on the merits of their Dormant Commerce Clause claim by improperly interpreting National Pork. That is because the District Court erred in concluding the "extraterritoriality doctrine" is a dead-letter under National Pork. A18. Pricing statutes such as the Legislation, directly regulating commerce in other States, remain invalid under the Dormant Commerce Clause. The language quoted above from National Pork confirms this.

The District Court reached an improper legal conclusion by not recognizing that pricing control statutes like the Legislation remain invalid. The Healy Court determined protectionist law favoring Connecticut distributors was unconstitutional. The District Court failed to find the Legislation similarly favors New Jersey temporary workers at the expense of out-of-state companies. It is no answer that the Legislation applies equally to New Jersey and foreign companies. What is significant is New Jersey seeks to regulate pricing for out-of-state companies for work performed there. Under the Legislation, out-of-State companies may not negotiate pricing between agencies in their State and those in New Jersey below minimum wages for New Jersey residential workers.

The District Court erred distinguishing the Legislation from the "protectionist" statutes invalidated in Baldwin and Brown-Forman. A18-20. In certain ways, the Legislation reaches more deeply out-of-state. The Legislation mandates out-of-

state companies abide by its pricing terms. Whereas New York in Baldwin regulated *in-state pricing* on milk sales by prohibiting discounted sales out-of-state, so too the Legislation prohibits lower pricing out-of-state. The Legislation goes further, mandating prices on *out-of-state sales*.

Plaintiffs have therefore made the necessary showing of the likelihood of success on the merits of their claim that the Legislation violates the Dormant Commerce Clause.

2. Plaintiffs Established That They Will Likely Succeed in Their Claim That the Legislation Is Unconstitutionally Vague.

As recognized by the District Court, a law is unconstitutionally vague under the Due Process Clause only if it "'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so *standardless that it authorizes or encourages seriously discriminatory enforcement.'"* United States v. Williams, 553 U.S. 285, 304 (2008) (emphasis added). A23. Plaintiffs submit that they establish reasonable likelihood of success on this issue because Section 7b of the Legislation, is so standardless that the ultimate result will be discriminatory enforcement.

In Connally v. General Const. Co., 269 U.S. 385 (1926), the Court considered a preliminary injunction upon Oklahoma statutes requiring payment to workers employed by or on behalf of the State in an amount no less than current rate of wages in the locality which the work is being performed for "laborers, workmen,

mechanics, prison guards, janitors in public institutions, or such other persons so employed". A construction company challenged the statute as an unconstitutional taking, and due to its vagueness. Because the statutes "contain no ascertainable standard of guilt, that it cannot be determined with any degree of certainty what sum constitutes a current wage in any locality; and that the term 'locality' itself is fatally vague and uncertain." Id at 390. The Supreme Court agreed with the vagueness challenge, stating:

> We are of opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words "current rate of wages" do not denote a specific or definite sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc., as the bill alleges is the case in respect of the territory surrounding the bridges under construction. The statutory phrase reasonably cannot be confined to any of these amounts, since it imports each and all of them. The "current rate of wages" is not simple but progressive – from so much (the minimum) to so much (the maximum), including all between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definitive answer People ex rel. Rodgers v. Coler, 166 N.Y. 1, 24-25.
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> * * *
>
> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them

> liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. International Harvester Co. v. Kentucky, 234 U.S. 216, 221; Collins v. Kentucky, 234 U.S. 634-638.

The Court affirmed the grant of a preliminary injunction barring enforcement, entered before any enforcement actually took place.

Though decided almost a century ago, Connally is still sound law in the Third Circuit. It was quoted in SanFillipo v. Bongiovanni, 961 F.2d 1125, 1135 (3rd Cir. 1990) cert. den. 506 U.S. 908 (1992).

In rejecting Plaintiffs' vagueness challenge to the Legislation, the District Court stated that the factors raised by Plaintiffs, "have given away the game; they are tacitly admitting that they know *exactly* the sort of relevant factors that ought to be considered in identifying a proper comparator-employee for the calculation of pay and benefits under the [Legislation]." A24. Plaintiffs respectfully disagree with that legal conclusion because it is, in fact, those infinite number of potential factors and the combinations and permutations of potential factors, that results in a standardless measure from which the Department can pick and choose for enforcement. A272.

a. The benefits-equivalency provisions are unconstitutionally vague.

The Legislation does not define "benefits", and as used in the context of the Legislation, is so broad as to what encompasses "benefits" that this lack of specificity makes it standardless.

The Legislation's preamble shows the Legislature was focused on employer-sponsored retirement and health benefits. See N.J.S.A. 34:8D-1(b), Add. 1. Thus, temporary help service firms and third-party clients could correctly assume that "benefits" means retirement and health benefits.

The definition of "benefits" provided in the notice of proposed regulations ("Notice"), issued on July 21, 2023, however, shows how wrong those businesses would be. Defendants go far beyond what the Legislature intended. The Notice provides a definition of "Benefits" as "employee fringe benefits, *including but not limited to*, health insurance, life insurance, disability insurance, paid time off (including vacation, holidays, personal leave and sick leave in excess of what is required by law) training, and pension." N.J.A.C. 12:72-2.1 (emphasis added), Add. 51. This creates an open-ended list of potential benefits which qualify and are subject to subjective application. Some types of benefits, such as vacation time, are accrued over a specified period. Benefits including health insurance may have waiting periods prior to their effective date.

Neither the Legislation nor the Notice take into account situations where staffing agencies provide benefits for the employee. The formula to determine

average rate of wages and benefits creates a perverse outcome where an employee accepts benefits from the staffing firm and receives a cash payment on top of the cost of benefits. The Notice makes no distinction between employees who accept or reject benefits.

Similarly absent from the Legislation are standards for making determinations about the innumerable benefits plans and how these may be converted to "cash equivalent". The Notice attempts to provide a formula to calculate "cash equivalent" of benefits, id. at N.J.A.C. 12:72-7.2(d), Add. 73, but it is mathematically impossible to prepare a formula for determining the cost of "benefits" as now explained in the Notice. The fact is that there are innumerable potential benefits plans, and how those plans can be converted to a "cash equivalent" is not explained, by the Legislation or proposed regulations. Add. 3, 16-17, 51, 72-73. Regarding the value of benefits, the Legislation provides no guidance with regard to voluntary benefit plans or plans whose costs are shared by the employee and client. Each of the thousands of potential benefits plans might have a different answer as to what they use to define benefits packages, which is relevant to this determination. A272.

It is also well known that medical plans, 401(k) plans and pension plans all have waiting periods, and it is entirely unclear how to account for an employee not receiving that benefit from the third-party client as opposed to those who are. There is no explanation on how to treat individuals who decline employer benefits since

they receive coverage from either the State Marketplace, Medicare, Medicaid, or Veterans programs. Vesting schedules, profit-sharing plans and employer contributions depending on the length of time in the plan are obviously relevant but nowhere addressed. Plus, calculations are entirely different based upon whether a comparator employee is enrolled or not enrolled in employer-paid benefits. None of these questions are answered in Section 7b of the Legislation, or in the proposed regulations. Id.

The District Court's Opinion fails to address this conundrum, other than to indicate Plaintiffs can make these determinations based upon their experience complying with other statutes and may ask questions during the comment period. A23-26. The District Court's citations to other statutes as providing guidance, A24-25, are inapposite: those statutes concern intra-company comparisons while the Legislation requires inter-company comparisons. Respectfully, this does not solve the Legislation's vagueness.

It is simply impossible to prepare a formula for determining the cost of benefits for medical, 401(k) and pension plans across all such clients and employees. The Department, therefore, has been given *carte blanch*e to decide one calculation is "correct" and the other "wrong" solely based on a whim.

b. The Legislation's comparator provisions are unconstitutionally vague.

The foundation of the equal pay and benefits provision is a determination of

"employees of the third party client performing the same or substantially similar work." N.J.S.A. 34:8D-7(b), Add. 16. Covered laborers cannot be paid less than the average rate of pay and average cost of benefits, or the cash equivalent, of those employees. Yet the Legislation does not define "same or substantially similar work". Add. 3. This is the type of standardless language which creates no rule and authorizes seriously discriminatory enforcement.

The Defendants seek to be the sole arbiter of determining whether work is the "same or substantially similar," and leave Plaintiffs in a never-ending guessing game, based upon the Notice. Add. 31-83. The Notice lists a series of "principles" for comparing employees. Add. 74-75. The Notice goes beyond the language of the Legislation, and lists a large number of subjective, and contradictory, factors or "principles" for making this determination. These "principles" listed at N.J.A.C. 12:72-7.3, Add. 74-75, are contradictory and are so subjective that persons "'of common intelligence must necessarily guess at its meaning and differ as to its application.'" Karins v. Atlantic City, 152 N.J. 532, 541 (1998) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

For example, similarity of work "should be viewed as a composite of skill, effort and responsibility performed under similar working conditions." N.J.A.C. at 12:72-7.3(a)(1). Add. 74. Yet job descriptions are not dispositive, and analyses must be done over entire work cycles and not snap shots. Id. at 12:72-7.3(a)(4), (6). Skill

is measured by experience, ability, education and training. Id. at 12:72-7.3(a)(7). But seniority is irrelevant to the determination, except insofar as the number of years required to perform the job. Id. at 12:72-7.3(a)(10), Add. 75. And despite "skill" being a factor for the comparator determination, the use of a "merit system" for compensation is irrelevant. Id. at 12:72-7.3(a)(11).

One of the principles states that, "Occasional, trivial or minor differences in duties that only consume a minimal amount of the employee's time will not render the work dissimilar," Add. 74 (Id. as 12:72-7.3(a)(3)). In reality, occasional differences in duties may be extremely important for that person's work. Another principle defines working conditions as "physical surroundings and hazards" but does "not include job shifts." Add. 75, Id. at 12:72-7.3(a)(12). The shift a person works directly impacts their physical surroundings and hazards.

These contradictions and lack of standards undermine the District Court's findings that these proposed regulations provide "fairly comprehensive instructions for the calculation of appropriate wages and benefits." A25. Even sophisticated employers in the temporary staffing industry lack understanding of these vague, contradictory provisions. This is not a situation where parties are disputing a word on the margins; Section 7(b) is a core element of the Legislation's entire reason for existing. Add. 16-17. Standardless, arbitrary enforcement, together with joint and several liability amongst third party clients and the temporary staffing agencies,

makes the current situation untenable.

The District Court is thus incorrect in its conclusion the Legislation is not unconstitutionally vague. A23-26. That Plaintiffs' members are sophisticated employers, A24, does not establish a meaningful standard protecting against arbitrary enforcement. The District Court's reference to other employment statutes requiring cross-employee comparisons, A24-25, all involving intra-company comparisons or specified minimum wage laws, does not solve the vagueness problem. While the District Court correctly notes Plaintiffs' concerns about third party clients' unwillingness to provide pricing information, problems extend beyond burdensome compliance. A25. Their lack of understanding, combined with an unwillingness to share proprietary information, results in the loss of business.

c. The District Court Improperly Relied Upon the Regulatory Process to Cure the Legislation

The District Court's Opinion noted that Plaintiffs may provide comments to clarify the regulations before they are finalized and promulgated. A25. This does not and cannot provide the necessary answers to these undefined and unexplained provisions. Plaintiffs are also not mollified by Defendants' representation that, "until the final adoption of the proposed regulations, they will not interpret nor enforce Section 7 in a contrary manner." A26. The meaning of "contrary" is unclear, in comparison to an unknown definition.

Indeed, the District Court commented:

> Defendants' [Commissioners'] unwillingness to consider even a brief non-enforcement agreement, particularly as it relates to the pay provision, during the notice-and-comment period for their recently proposed regulations-issued on the eve of the Legislation taking effect – so that all involved parties and stakeholders could fairly assess and plan for the Legislation's implementation is disappointing given the tremendous changes that are about to occur. A16.

The District Court's heavy reliance on the Notice was misplaced for several reasons. First, the proposed regulations have yet to be adopted, and the form they will ultimately take is unknown. Second, as discussed above, the content of the regulations, as proposed, does not cure the defects in the Legislation. And, third, if regulations are adopted implementing the pay and benefit provisions, and are ripe for challenge in the appropriate forum, they will likely be held to be void as ultra vires.

N.J.S.A. 34:8D-1 et seq. has thirteen sections. Only two, contained in Subsection 5(i) and subsection 10(c), provide authorization to adopt regulations. Add. 10-12, 24-25. The other 11 sections of the statute, including Section 7, do not. And, Section 5 and Section 10 are completely irrelevant to the wages and value of benefits to be paid to temporary workers.

"[A]n administrative officer is a creature of legislation who must act only within the bounds of the authority delegated to him." In re Closing of Jamesburg High Sch., 83 N.J. 540, 549 (1980)(quoting, Elizabeth Fed. Sav. & Loan Ass'n v.

Howell, 24 N.J. 488, 499 (1957)). "Where there exists reasonable doubt as to whether such power is vested in the administrative body, the power is denied." In re Closing of Jamesburg High Sch., 83 N.J. 540, 549 (1980)(citing, Swede v. City of Clifton, 22 N.J. 303, 312 (1956)); See also, In re N.J.A.C. 7:1B-1.1 et seq., 431 N.J. Super. 100, 116-117 (2013) certif. den. 216 N.J. 8, 363 (2013).

The Legislature is also presumed to know "how to give a person or entity …power…." Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 244 N.J. 75, 111 (2020) cert. den. 141 S.Ct. 2596 (2021)(finding that city council could not give subpoena power to local board). Further, "the Legislature knows how to express its intent, and the presence of explicit language of other statutory provisions may imply a legislative intent different from the expressed language in the Statute at issue." McLaren v. Ups Store, 2021 N.J. Super. Unpub. LEXIS 1510, *11-12. When "'the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.'" In re Plan for the Abolition of the Council on Affordable Housing, 214 N.J. 444, 470 (2013)(citing Higgins v. Pascack Valley Hosp., 158 N.J. 404, 419, 730 A.2d 327 (1999) State v. Drury, 190 N.J. 197, 215, 919 A.2d 813 (2007)) In State v. Coviello, 252 N.J. 539 (2023), the court held the Legislature had given the Motor Vehicle Commission authority over the ministerial function of implementing the DWI act. It did not give it the power to establish punishment. Id. at 555.

If the Legislature had authorized the Defendants to promulgate regulations with respect to the entire Legislation, it would have included that authorization as a separate section of the statute that referred to the whole act. See e.g., New Jersey Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544 (1978) For instance, the Legislature passed the Coastal Area Facility Review Act, N.J.S.A. 13:19-1, et seq., which prohibits development in certain coastal areas. N.J.S.A. 13:19-5. In a separate, stand alone section of the Legislation, the legislature included a provision that states, "The department shall, pursuant to the provisions of the 'Administrative Procedure Act,"…, adopt rules and regulations to effectuate the **purposes of this act**. N.J.S.A. 13:19-17a. In the Legislation, the Legislature provided in two sections (also Section 10) the authority to promulgate regulations **for those sections only-** prohibiting for example in Section 5a temporary service agency from charging a temporary laborer a fee for transportation. N.J.S.A. 34:8D-5i (The commissioner may promulgate regulations **under this section** in accordance with the "Administrative Procedure Act…."). If it had meant for the agency to have authority to promulgate regulations regarding the entirety of the Legislation, it would have said so.

The District Court's reliance on the proposed regulations was therefore misplaced because the regulations are likely invalid and, even if valid, they do not cure the unconstitutionally vague provisions of the Legislation. The same vagueness

leads to arbitrary enforcement of the Legislation.

d. The District Court Erred in Concluding the Legislation Was Not Unconstitutionally Vague

The District Court's opinion completely fails to address Plaintiffs' vagueness argument as it relates to the calculation of the cost of benefits and the ability to compare employees. The District Court erred in its legal conclusion that the Act's pay and benefits provisions, N.J.S.A. 34:8D-7(b), are not unconstitutionally vague. Inherent problems with these provisions stem from the required comparison between employees from different companies and calculations associated with their cost of pay and cost of benefits.

Plaintiffs respectfully submit they cannot comply with Section 7b and other provisions of the Legislation due to their vagueness. The same vagueness leads to arbitrary enforcement of the Legislation. Therefore, the Legislation must be found to be unconstitutionally vague.

3. The Legislation Represents an Unreasonable Exercise of Police Power.

The test to determine whether an exercise of police power is a reasonable one is two-fold: the interests of the public requiring the State's imposition of its authority is valid; and, the means are reasonably necessary to accomplish the purpose. Lawton v. Steele, 152 U.S. 133, 136 (1894). The Court noted, "[t]he Legislation may not, under the guise of protecting the public interests arbitrarily interfere with private

businesses, or impose unusual and unnecessary restrictions upon lawful occupations." Id.

Plaintiffs readily concede that protection of the interests of temporary workers is a legitimate State objective. The problem is the means selected; i.e., the Legislation fails the second prong.

The Legislation is indecipherable. It also assumes that clients will provide wage and benefit information and the Declarations demonstrate that clients will not do so. The Declarations establish that the Legislation will drive businesses from the State, decimate New Jersey temporary staffing providers and as a result, hurt temporary workers.

Plaintiffs believe that the Legislation gave no consideration to the interplay between Section 7(b)'s requirement that temporary workers be paid the average cash value of the client's "similar" employees, and federal promulgations including the Internal Revenue Code ("IRC"), the Affordable Care Act ("ACA"), and the Fair Labor Standards Act ("FLSA").

As a practical matter, while an employer can offer "cash in lieu of benefits", it must follow Section 125 of the IRC, as well as the rules regarding the "affordability calculation" of the ACA, and must be treated as part of the regular rate of pay when calculating overtime under the FLSA. See Flores v. City of San Gabriel, 824 F.3d 890 (9th Cir. 2016). Specifically:

- IRC Section 125 requires that an IRS approved plan be in place. If the plan is not set up as an IRC Section 125 plan, the plan will be disqualified and employees will not be able to participate in the plan. (https://www.irs.gov/pub/irs-tege/lesson4.pdf)
- Under the ACA, if a cash option is offered without an IRS qualified plan, the payment must be included in the ACA's affordability calculation. (Information Reporting by Applicable Large Employers/Internal Revenue Service (irs.gov).
- Under the FLSA, any opt-out payments made by an employer to an employee must be included in an employee's regular rate of pay and therefore is used in calculating overtime compensation for non-exempt employees. Handy Reference Guide to the Fair Labor Standards Act/U.S. Department of Labor (dol.gov).

Thus, the Legislation's average cash value of benefits provision would require that temporary staffing providers establish an IRS qualified plan.

Moreover, it is not difficult to conjure a situation where compliance with the Legislation is at odds with the intent, if not the letter, of other laws. For example,

the Legislation in effect makes temporary workers a suspect classification, and requires that they be paid more than longer tenured, full-time employees of the third-party client. Assume, for instance, that the temporary workers are male, and the longer tenured, full-time employees are female. Under the Legislation, the male temporary employees are paid more than the longer tenured, female employees, in violation of the spirit, if not the letter, of the Diane B. Allen Equal Pay Act, N.J.S.A. 10:5-12. This places an entire industry and the third-party clients in a Hobson's choice of compliance with pay equity laws.

The Plaintiffs are likely to succeed on their claim that the Legislation is an unreasonable exercise of police power. The District Court erred in not so finding.

B. Plaintiffs Established and the District Court Properly Found That Plaintiffs Are Irreparably Harmed by the Legislation.

Plaintiffs filed twelve Declarations establishing the real economic harm being caused to members of the staffing industry. A65-92; A136-167. This led the District Court to conclude that Plaintiffs had established the irreparable harm requirement. A11-16. The record supporting this finding of irreparable harm is compelling. Because of the relevance of the Dormant Commerce Clause issue, Plaintiffs highlight one such Declaration.

The Declaration of David Hayes, plant manager of Rogers Foam Corporation, located in Pennsylvania, highlights the burdens on interstate commerce. A142-144. His company had hired temporary employees from New Jersey temporary staffing

companies, but will no longer do so. He stated the Legislation will decimate the temporary staffing business in New Jersey. Id. New Jersey staffing companies will be ignored for further work. He explained that the Legislation results in overpayment of wages to temporary employees and that, if he hired and paid temporary employees in accordance with the Legislation, he would not be able to retain permanent employees. Id. They cannot negotiate for Pennsylvania-based temporary workers while forced to disclose pricing information to third-party staffing companies from New Jersey. Id.

The District Court found, based upon the Declarations, the likelihood that at least some subset of Plaintiffs' members will be forced out of business by the Legislation. The District Court recognized that, while economic loss alone will ordinarily be insufficient to establish irreparable harm, economic loss is sufficient to establish irreparable harm where the loss is not recoverable, or the loss is so substantial that it threatens the existence of a business, citing Minard Run Oil Co. v. U.S. Forest Service, 670 F.3d 236, 255 (3d Cir. 2011). (ECF 34, p. 11-12]. The District Court found:

> Statements taken from this leader and others demonstrate the likelihood that at least some subset of Plaintiffs' members will be forced out of business if the [Legislation] goes into effect. A12-13.

The District Court correctly found that the Legislation threatened Plaintiffs' members' existence, and that their economic loss was not recoverable against the

Defendants as a result of the immunity under the Eleventh Amendment. A14.

1. Because Defendants Have Immunity From Monetary Damages, Plaintiffs' Economic Losses Constitute Irreparable Harm.

In Cigar Assoc. of Am. v. City of Phil., 500 F. Supp. 3d 428 (E.D. Pa. 2020) aff'd 2021 U.S. App. LEXIS 34952 (3d Cir), the Court considered a preliminary injunction in connection with a challenge to an ordinance which barred the sale of flavored tobacco products. The Court noted that "And while the exact amount of damages to plaintiffs may be speculative, the likelihood of damages is not." Id. at 437. Further, due to the Eleventh Amendment, those damages could not be recovered. The loss to plaintiffs was therefore irreparable.

In ITServe Alliance, Inc. v. Scalia, 2020 U.S. Dist. LEXIS 227049 (D.N.J.), plaintiff challenged a Department of Labor interim final rule that substantially increased wages for non-immigrant foreign workers, apparently so they would not be able to be employed to the disadvantage of United States workers. The court further explained that the rule's change to the prevailing wage would significantly increase the employers' operational costs. The exception to the "purely economic harm" rule was recognized, where the economic harm was so great to the plaintiff's business as to threaten its existence. Moreover, the losses were irreparable because federal law did not allow for a monetary recovery to a party wronged by agency action. Id., at *38. See also Johnson v. Guhl, 91 F. Supp. 2d 754, 771 (D.N.J. 2000) in which the court considered the immunity provided by the Eleventh Amendment in

determining that the plaintiffs had established irreparable harm because the plaintiffs would not be able to obtain a monetary recovery.

And, in Atlantic Coast Demolition & Recycling v. Bd. Of Chosen Freeholders, 893 F. Supp. 301, 309 (D.N.J. 1995), the court, though not convinced by the plaintiff's assertion that the laws in question were driving it out of business, nevertheless found that plaintiff was subjected to irreparable harm because plaintiff had "a high degree of monetary damages" The court added; "Furthermore, the damage was inflicted by the State of New Jersey and its agencies all of whom are immune from money damages in this court under the Eleventh Amendment. Where the Eleventh Amendment bars recovery of money damages from state entities, the plaintiff has shown irreparable harm necessary for injunctive relief."

As discussed supra, Plaintiffs believe that they have made a strong showing that they will likely succeed on their claims that the Legislation violates the Dormant Commerce clause and the Due Process Clause. They further note that the Third Circuit recognizes a balancing test, or sliding scale, among the various factors for injunctive relief. In other words, the stronger the showing of irrepairable harm, the lesser the burden of establishing likelihood of success on the merits, and vice versa. Revel AC Inc. IDEA Boardwalk LLC, 802 F.3d 558, 567-570 (3rd Cir. 2015); Constructors Assn. of W. Pa v. Kreps, 573 F.2d 811, 814-815 (3rd Cir. 1978); Del. River Auth v. Transamerican, Trailer Transport, Inc., 501 F.2d 917, 923 (3rd Cir.

1974).

2. Plaintiffs' Members' Losses Satisfy The Minard Run Oil Exception To The Economic Loss Rule.

In Minard Run Oil Co. v. United States Forest Service, 670 F.3d 236, 255 (3d Cir. 2022), the court held that an exception to the rule that preliminary injunctive relief is not available where only purely economic loss existed if the losses are very substantial and could possibly lead to bankruptcy if preliminary injunctive relief is not granted. See also Revel AC Inc., supra 802 F.3d at 572, in which the Third Circuit held that a party's loss of its multi million dollar investment and the opportunity to operate a profitable business, justified applying the Minard Run Oil exception to the purely economic loss rule, and found irreparable harm.

In this case, the supplemental declarations establish tremendous financial losses, and the Minard Run Oil exception to the purely economic loss rule is satisfied. For example, staffing company TeleSearch declares that its top 10 industrial clients, producing almost $10 million in revenues, will cancel its services, and that with this loss of revenues, it will not be able to continue operations. A163. ProStaff Workforce Solutions is losing clients producing $8,700,000 in revenues, and with this loss it will close operations. A167. Staffing Alternatives avers that it is losing clients producing over $50 million in revenues. A160. United Temporary Services is losing clients producing $28 million in revenues. A155. These are but five representatives of a much larger industry. (American Staffing Association alone

has 93 New Jersey staffing company members. A87).

C. The Potential Harm and Public Interest Factors Support an Injunction.

Plaintiffs satisfy the other prongs of the standard for granting injunctive relief, i.e., harm to others and the public interest. On the sliding scale of preliminary injunction factors, these factors are accorded less weight. Revel AC Inc., supra, 802 F.3d at 570-571. There are hundreds of thousands of New Jersey temporary employees every year. A82. The temporary staffing industry fulfills a critical need for their third-party clients and is an important part of the State's economy. A68-69. And, as detailed above, the Legislation is having a devasting impact upon the temporary staffing industry.

The public interest enjoining the Legislation is evident. Because this action challenges the constitutional validity of a state statute, the action, by definition, presents issues of public importance. Moreover, given the importance of the temporary staffing industry to the State's economy, and the impact of the Legislation upon temporary service providers and their clients, the public interest is clear. No person or entity can be harmed by enjoining unconstitutional laws causing irreparable harm. Moreover, the interests of temporary employees are heavily protected by other laws, such as wage and hour legislation with respect to pay, and other statutory protections concerning worker safety. Granting injunctive relief will not leave temporary workers unprotected.

D. The District Court Abused Its Discretion In Denying Plaintiffs Injunctive Relief.

The Legislation is decimating the New Jersey temporary staffing industry. The Legislation is similarly harmful to New Jersey businesses which utilize the services of temporary staffing companies. Paradoxically, the Legislation is ultimately harmful to New Jersey temporary workers whom the Legislation was intended to protect. The District Court correctly determined that Plaintiffs had established the irreparable harm prong of the requirements for injunctive relief.

The Legislation imposes a heavy burden on interstate commerce by fixing the pricing for New Jersey temporary workers working out-of-state, as well as other burdens on out-of-state third-party clients such as providing wage and benefit information, record keeping, and the risk of joint and several liability. Staffing industry members and their clients do not understand the Legislation, and the proposed regulations do not make the Legislation any more comprehensible, making the Legislation subject to arbitrary enforcement.

Under these circumstances, the Legislation should be enjoined. It is respectfully submitted the District Court abused its discretion in refusing to do so, denying Plaintiffs' application for preliminary injunctive relief.

CONCLUSION

For the foregoing reasons and authorities, it is respectfully submitted that the Court should enjoin the operation and enforcement of the Legislation, reversing the

decision of the District Court.

Respectfully submitted,

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/s/ Rubin M. Sinins
DATED: November 13, 2023 RUBIN M. SININS

CERTIFICATION OF COUNSEL - STEVEN B. HARZ
For Case No. 23-2419

I, Steven B. Harz, hereby certify as follows:

1. Pursuant to Third Circuit Local Rule 28.3, I certify I am a member of the bar of this Court.

2. Pursuant to Federal Rules of Appellate Procedure 28(a)(10), 32(a)(7), and 32(g), the Plaintiffs-Appellants' Brief is proportionately spaced, has a typeface of 14-point or more, and contains 9,281 words.

3. Pursuant to Third Circuit Local Rule 31.1(c), the text of this electronic brief is identical to text in the paper copies of the brief.

4. Pursuant to Third Circuit Local Rule 31.1(c), a virus detection program was run on this electronic brief using SentinelOne antivirus protection and no virus was detected.

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1. Pursuant to Third Circuit Local Rule 28.3, I certify I am a member of the bar of this Court.

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I, Rubin M. Sinins, hereby certify as follows:

1. Pursuant to Third Circuit Local Rule 28.3, I certify I am a member of the bar of this Court.

2. Pursuant to Federal Rules of Appellate Procedure 28(a)(10), 32(a)(7), and 32(g), the Plaintiffs-Appellants' Brief is proportionately spaced, has a typeface of 14-point or more, and contains 9,281 words.

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DATED: November 13, 2023

CERTIFICATION OF SERVICE
For Case No. 23-2419

I hereby certify that on November 13, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I caused to have served the Plaintiffs-Appellants' brief via electronic service on the following:

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ADDENDUM

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Statutes

Proposed Regulations

Add. 1

N.J. Stat. § 34:8D-1

Current through New Jersey 220th Second Annual Session, L. 2023, c. 107 and J.R. 11

LexisNexis® New Jersey Annotated Statutes > Title 34. Labor and Workers' Compensation (Chs. 1 — 21) > Chapter 8D. Temporary Labor (§§ 34:8D-1 — 34:8D-13)

§ 34:8D-1. Findings, declarations

The Legislature finds and declares:

a. At least 127,000 individuals work for temporary help service firms, sometimes referred to as temp agencies or staffing agencies, in New Jersey. Approximately 100 temporary help service firms with several branch offices are licensed throughout the State. Moreover, there are a large, though unknown, number of unlicensed temporary help service firms that operate outside the purview of law enforcement.

b. Recent national data indicate that the share of Black and Latino temporary and staffing workers far outstrips their proportion of the workforce in general. In addition to a heavy concentration in service occupations, temporary laborers are heavily concentrated in the production, transportation, and material moving occupations and manufacturing industries. Further, full-time temporary help service firm workers earn 41 percent less than workers in traditional work arrangements, and these workers are far less likely than other workers to receive employer-sponsored retirement and health benefits.

c. Recent studies and a survey of low-wage temporary laborers themselves find that, generally, these workers are particularly vulnerable to abuse of their labor rights, including unpaid wages, failure to pay for all hours worked, minimum wage and overtime violations, unsafe working conditions, unlawful deductions from pay for meals, transportation, equipment, and other items, as well as discriminatory practices.

d. This act is intended to further protect the labor and employment rights of these workers.

History

L. 2023, c. 10, § 1, effective August 5, 2023.

Annotations

Notes

Effective Dates

Section 16 of L. 2023, c. 10 provides: "This act shall take effect on the 180th day after the date of enactment, except that sections 3 and 10 shall take effect on the 90th day after the date of enactment, provided however that the commissioner and director may take such anticipatory action as deemed necessary prior to the effective date." Chapter 10, L. 2023, was approved on Feb. 6, 2023.

Add. 2

N.J. Stat. § 34:8D-1

End of Document

Add. 3

N.J. Stat. § 34:8D-2

Current through New Jersey 220th Second Annual Session, L. 2023, c. 107 and J.R. 11

LexisNexis® New Jersey Annotated Statutes > Title 34. Labor and Workers' Compensation (Chs. 1 — 21) > Chapter 8D. Temporary Labor (§§ 34:8D-1 — 34:8D-13)

§ 34:8D-2. Definitions

As used in P.L.2023, c.10 (C.34:8D-1 et al.):

"Commissioner" means Commissioner of Labor and Workforce Development, or a designee of the commissioner.

"Director" means Director of the Division of Consumer Affairs in the Department of Law and Public Safety, or a designee of the Director.

"Employ" means to suffer or permit to work for compensation, including by means of ongoing, contractual relationships in which the employer retains substantial direct or indirect control over the employee's employment opportunities or terms and conditions of employment.

"Employer" means any person or corporation, partnership, individual proprietorship, joint venture, firm, company, or other similar legal entity who engages the services of an employee and who pays the employee's wages, salary, or other compensation, or any person acting directly or indirectly in the interest of an employer in relation to an employee.

"Hours worked" means all of the time that the employee is required to be at the employee's place of work or on duty. Nothing in P.L.2023, c.10 (C.34:8D-1 et al.) requires an employer to pay an employee for hours the employee is not required to be at the employee's place of work because of holidays, vacation, lunch hours, illness, and similar reasons. "Designated classification placement" means an assignment of a temporary laborer by a temporary help service firm to perform work in any of the following occupational categories as designated by the Bureau of Labor Statistics of the United States Department of Labor: 33-90000 Other Protective Service Workers; 35-0000 Food Preparation and Serving Related Occupations; 37-0000 Building and Grounds Cleaning and Maintenance Occupations; 39-0000 Personal Care and Service Occupations; 47-2060 Construction Laborers; 47-30000 Helpers, Construction Trades; 49-0000 Installation, Maintenance, and Repair Occupations; 51-0000 Production Occupations; 53-0000 Transportation and Material Moving Occupations; or any successor categories as the Bureau of Labor Statistics may designate.

"Person" means any natural person or their legal representative, partnership, corporation, company, trust, business entity, or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee, or beneficiary of a trust thereof.

"Temporary laborer" means a person who contracts for employment in a designated classification placement with a temporary help service firm. Temporary laborer does not include agricultural crew leaders who are registered under the federal Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 et seq., P.L.1971, c.192 (C.34:8A-7 et seq.), or P.L.1945, c.71 (C.34:9A-1 et seq.).

"Temporary help service firm" means any person or entity who operates a business which consists of employing individuals directly or indirectly for the purpose of assigning the employed individuals to assist the firm's customers in the handling of the customers' temporary, excess or special workloads, and who, in addition to the payment of wages or salaries to the employed individuals, pays federal social security taxes and State and federal unemployment insurance; carries workers' compensation insurance as required by State law; and sustains responsibility for the actions of the employed

individuals while they render services to the firm's customers. A temporary help service firm is required to comply with the provisions of P.L.1960, c.39 (C.56:8-1 et seq.).

"Third party client" means any person who contracts with a temporary help service firm for obtaining temporary laborers in a designated classification placement. Third party client does not include the State or any office, department, division, bureau, board, commission, agency, or political subdivision thereof that utilizes the services of temporary help service firms.

History

L. 2023, c. 10, § 2, effective August 5, 2023.

Annotations

Notes

Editor's Notes

L. 2023, c. 10 was enacted in accordance with the Governor's recommendations made on conditional veto of the legislation (Assembly Bill No. 1474).

Effective Dates

Section 16 of L. 2023, c. 10 provides: "This act shall take effect on the 180th day after the date of enactment, except that sections 3 and 10 shall take effect on the 90th day after the date of enactment, provided however that the commissioner and director may take such anticipatory action as deemed necessary prior to the effective date." Chapter 10, L. 2023, was approved on Feb. 6, 2023.

End of Document

Add. 5

N.J. Stat. § 34:8D-3

Current through New Jersey 220th Second Annual Session, L. 2023, c. 107 and J.R. 11

LexisNexis® New Jersey Annotated Statutes > Title 34. Labor and Workers' Compensation (Chs. 1 — 21) > Chapter 8D. Temporary Labor (§§ 34:8D-1 — 34:8D-13)

§ 34:8D-3. Temporary help service firm, statement provided, time of dispatch, information, certain

a. Whenever a temporary help service firm agrees to send a person to work as a temporary laborer in a designated classification placement, the temporary help service firm shall provide the temporary laborer, at the time of dispatch, a statement, in writing in English and in the language identified by the employee as the employee's primary language, containing the following items on a form approved by the commissioner, in a manner appropriate to whether the assignment is accepted at the temporary help service firm's office, or remotely by telephone, text, email, or other electronic exchange:

(1) the name of the temporary laborer;

(2) the name, address, and telephone number of:

(a) the temporary help service firm, or the contact information of the firm's agent facilitating the placement;

(b) its workers' compensation carrier;

(c) the worksite employer or third party client; and

(d) the Department of Labor and Workforce Development;

(3) the name and nature of the work to be performed;

(4) the wages offered;

(5) the name and address of the assigned worksite of each temporary laborer;

(6) the terms of transportation offered to the temporary laborer, if applicable;

(7) a description of the position and whether it shall require any special clothing, protective equipment, and training, and what training and clothing will be provided by the temporary help service firm or the third party client; and any licenses and any costs charged to the employee for supplies or training;

(8) whether a meal or equipment, or both, are provided, either by the temporary help service firm or the third party client, and the cost of the meal and equipment, if any;

(9) for multi-day assignments, the schedule;

(10) the length of the assignment, if known; and

(11) the amount of sick leave to which temporary workers are entitled under P.L.2018, c.10 (C.34:11D-1 et seq.), and the terms of its use.

In the event of a change in the schedule, shift, or location of an assignment for a multi-day assignment of a temporary laborer in a designated classification placement, the temporary help service firm shall provide notice of the change not less than 48 hours in advance to the temporary laborer, when possible, in a manner appropriate to whether the assignment is accepted at the temporary help service firm's office, or remotely by telephone, text, email, or other electronic exchange. The temporary help service firm shall bear the burden of showing that it was not possible to provide the required notice. In the event that the

commissioner imposes a civil penalty under subsection d. of this section and the temporary help service firm requests a hearing to challenge the penalty, any dispute concerning whether it was possible for the temporary help service firm to provide the required notice shall be adjudicated during that hearing.

If a temporary laborer in a designated classification placement is assigned to the same assignment for more than one day, the temporary help service firm shall be required to provide the employment notice only on the first day of the assignment and on any day that any of the terms listed on the employment notice are changed.

If the temporary laborer is not placed with a third party client or otherwise contracted to work for that day, the temporary help service firm shall, upon request, provide the temporary laborer with a confirmation that the temporary laborer sought work, signed by an employee of the temporary help service firm, which shall include the name of the firm, the name and address of the temporary laborer, and the date and the time that the temporary laborer receives the confirmation.

b. No temporary help service firm shall send any temporary laborer to any designated classification placement where a strike, a lockout, or other labor dispute exists without providing, at the time of dispatch, a statement, in writing, informing the temporary laborer of the labor dispute, and the laborer's right to refuse the assignment.

c. Temporary help service firms that make designated classification placements shall make available, whether through its own employees or the service of a vendor, personnel to effectively communicate the information required in subsections a. and b. of this section to temporary laborers in Spanish or in any other language that is generally understood in the locale of the temporary help service firm.

d. Any temporary help service firm that makes designated classification placements and that violates this section shall be subject to a civil penalty of not less than $500 and not to exceed $1,000 for each violation found by the commissioner. That penalty shall be collected by the commissioner in a summary proceeding in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

e. The commissioner, in consultation with the Office of the New Americans within the Department of Human Services, shall develop and implement a multilingual outreach program to inform temporary laborers in a designated classification placement about their rights pursuant to P.L.2023, c.10 (C.34:8D-1 et al.). The program shall develop written materials in various languages based on the 10 most prevalent language access needs in the State, and may periodically reevaluate the language access needs and adjust translation efforts accordingly. The program shall include the distribution of written materials to qualifying organizations who work with temporary workers in a designated classification placement, and shall engage in regular outreach to these organizations to determine how the commissioner can better inform temporary laborers of their rights. For purposes of this subsection, qualifying organizations are organizations that have a minimum of five years of experience working with temporary laborers or hiring entities, and organizations that work with nonprofit organizations that have a minimum of five years of experience working with temporary laborers or hiring entities.

History

L. 2023, c. 10, § 3, effective May 7, 2023.

Annotations

Notes

Editor's Notes

L. 2023, c. 10 was enacted in accordance with the Governor's recommendations made on conditional veto of the legislation (Assembly Bill No. 1474).

Effective Dates

Section 16 of L. 2023, c. 10 provides: "This act shall take effect on the 180th day after the date of enactment, except that sections 3 and 10 shall take effect on the 90th day after the date of enactment, provided however that the commissioner and director may take such anticipatory action as deemed necessary prior to the effective date." Chapter 10, L. 2023, was approved on Feb. 6, 2023.

End of Document

N.J. Stat. § 34:8D-4

Current through New Jersey 220th Second Annual Session, L. 2023, c. 107 and J.R. 11

LexisNexis® New Jersey Annotated Statutes > Title 34. Labor and Workers' Compensation (Chs. 1 — 21) > Chapter 8D. Temporary Labor (§§ 34:8D-1 — 34:8D-13)

§ 34:8D-4. Temporary help service firm, designated classification placements, recordkeeping, information, certain

a. Whenever a temporary help service firm sends one or more persons to work as temporary laborers in designated classification placements, the temporary help service firm shall keep the following records relating to that transaction:

(1) the name, address, and telephone number of the third party client, including each worksite, to which temporary laborers were sent by the temporary help service firm and the date of the transaction;

(2) for each temporary laborer: the name and address, the specific location sent to work, the type of work performed, the number of hours worked, the hourly rate of pay, and the date sent. The third party client shall be required to remit all information required under this paragraph to the temporary help service firm no later than seven days following the last day of the work week worked by the temporary laborer;

(3) the name and title of the individual or individuals at each third party client's place of business responsible for the transaction;

(4) any specific qualifications or attributes of a temporary laborer, requested by each third party client;

(5) copies of all contracts, if any, with the third party client and copies of all invoices for the third party client;

(6) copies of all employment notices provided in accordance with subsection a. of section 3 of P.L.2023, c.10 (C.34:8D-3);

(7) the amounts of any deductions to be made from each temporary laborer's compensation by either the third party client or by the temporary help service firm for the temporary laborer's food, equipment, withheld income tax, withheld contributions to the State unemployment compensation trust fund and the State disability benefits trust fund withheld Social Security deductions, and every other deduction;

(8) verification of the actual cost of any equipment or meal charged to a temporary laborer; and

(9) any additional information required by the commissioner.

b. The temporary help service firm shall maintain all records under this section for a period of six years from their creation. The records shall be open to inspection by the commissioner during normal business hours. Records described in paragraphs (1), (2), (3), (6), (7), and (8) of subsection a. of this section shall be available for review and copying by that temporary laborer at no cost or an authorized representative of the temporary laborer during normal business hours within five days following a written request. For purposes of this subsection, an authorized representative of the temporary laborer is a person as to whom the temporary laborer has presented to the temporary help service firm an authorization signed by the temporary laborer that expressly permits the person to review and copy the subject records.

In addition, a temporary help service firm that makes designated classification placements shall make records related to the number of hours billed to a third party client for that individual temporary laborer's hours of work available for review or copying, at no cost, during normal business hours within five days

following a written request. The temporary help service firm shall make forms, in duplicate, for those requests available at no cost to temporary laborers at the dispatch office. The temporary laborer shall be given a copy of the request form. It shall be a violation of this section to make any false, inaccurate, or incomplete entry into, or to delete required information from, any record required by this section.

c.

(1) Failure by the third party client to maintain and remit accurate time records to the temporary help service firm as provided in paragraph (2) of subsection a. of this section shall constitute a violation by a third party client under section 11 of P.L.2023, c.10 (C.34:8D-11), unless the third party client has been precluded from submitting those time records for reasons beyond its control. A third party client that violates paragraph (2) of subsection a. of this section shall be subject to a civil penalty not to exceed $500 for each violation found by the commissioner. The penalty shall be collected in a summary proceeding in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

(2) A failure by the third party client to provide time records in accordance with subsection b. of this section shall not be a violation and shall not be the basis for a suit or other action under section 11 of P.L.2023, c.10 (C.34:8D-11), against the temporary help service firm.

(3) Failure of a third party client to remit any information required by this section to a temporary help service firm shall not be a defense to the temporary help service firm recordkeeping requirements of this section.

History

L. 2023, c. 10, § 4, effective August 5, 2023.

Annotations

Notes

Editor's Notes

L. 2023, c. 10 was enacted in accordance with the Governor's recommendations made on conditional veto of the legislation (Assembly Bill No. 1474).

Effective Dates

Section 16 of L. 2023, c. 10 provides: "This act shall take effect on the 180th day after the date of enactment, except that sections 3 and 10 shall take effect on the 90th day after the date of enactment, provided however that the commissioner and director may take such anticipatory action as deemed necessary prior to the effective date." Chapter 10, L. 2023, was approved on Feb. 6, 2023.

End of Document

N.J. Stat. § 34:8D-5

Current through New Jersey 220th Second Annual Session, L. 2023, c. 107 and J.R. 11

LexisNexis® New Jersey Annotated Statutes > Title 34. Labor and Workers' Compensation (Chs. 1 — 21) > Chapter 8D. Temporary Labor (§§ 34:8D-1 — 34:8D-13)

§ 34:8D-5. Fee charge, transportation, designated work site, prohibited

a. A temporary help service firm or a third party client, or a contractor or agent of either, shall charge no fee to a temporary laborer in a designated classification placement to transport a temporary laborer to or from the designated work site.

b. A temporary help service firm shall be jointly and severally liable for the conduct and performance of any person who transports a temporary laborer in a designated classification placement from the firm to a work site, unless the transporter is:

(1) a public mass transportation system;

(2) a common carrier;

(3) the temporary laborer providing his or her own transportation; or

(4) selected exclusively by and at the sole choice of the temporary laborer for transportation in a vehicle not owned or operated by the temporary help service firm.

If any temporary help service firm provides transportation to a temporary laborer in a designated classification placement or refers a temporary laborer in a designated classification placement as provided in subsection d. of this section, the temporary help service firm shall not allow a motor vehicle to be used for the transporting of temporary laborers if the temporary help service firm knows or should know that the motor vehicle used for the transportation of temporary laborers is unsafe or not equipped as required by P.L.2023, c.10 (C.34:8D-1 et al.), unless the vehicle is:

(1) the property of a public mass transportation system;

(2) the property of a common carrier;

(3) the temporary laborer's personal vehicle; or

(4) a vehicle of a temporary laborer used to carpool other temporary laborers and which is selected exclusively by and at the sole choice of the temporary laborer for transportation.

c. A temporary help service firm shall not require a temporary laborer in a designated classification placement to use transportation provided by the firm or by another provider of transportation services.

d. A temporary help service firm shall not refer a temporary laborer in a designated classification placement to any person for transportation to a work site unless that person is:

(1) a public mass transportation system; or

(2) providing the transportation at no fee to the temporary laborer.

Directing a temporary laborer in a designated classification placement to accept a specific car pool as a condition of work shall be considered a referral by the temporary help service firm. Any mention or discussion of the cost of a car pool shall be considered a referral by the temporary help service firm. Informing a temporary laborer in a designated classification placement of the availability of a car pool driven by another temporary laborer shall not be considered a referral by the temporary help service firm.

The temporary help service firm shall obtain, and keep on file, documentation that any provider of transportation to a temporary laborer in a designated classification placement that the temporary help service firm makes referrals to or contracts with is in compliance with the requirements of subsections e., f., and g. of this section. The commissioner may randomly audit a temporary help service firm to ensure that the firm is maintaining the documentation required by this subsection.

e. Any motor vehicle that is owned or operated by a temporary help service firm that makes designated classification placements or a third party client of such a firm, or a contractor or agent of either, or to which a temporary help service firm refers a temporary laborer in a designated classification, which is used for the transportation of temporary laborers in a designated classification placement, shall comply with minimum insurance requirements set by the State of New Jersey. The driver of the vehicle shall hold a valid license to operate motor vehicles in the correct classification and shall be required to produce the license immediately upon demand by the commissioner or any other person authorized to enforce P.L.2023, c.10 (C.34:8D-1 et al.). The commissioner shall forward a violation of this subsection to the appropriate law enforcement authority or regulatory agency.

f. A motor vehicle that is owned or operated by the temporary help service firm that makes designated classification placements or a third party client of such a firm, or a contractor or agent of either, or to which a temporary help service firm refers a temporary laborer in a designated classification placement, which is used for the transportation of temporary laborers in a designated classification placement, shall have a seat and a safety belt for each passenger. The commissioner shall forward a violation of this subsection to the appropriate law enforcement authority or regulatory agency.

g. Unless the temporary laborer in a designated classification placement requests otherwise, when a temporary laborer in a designated classification placement has been transported to a work site, the temporary help service firm or a third party client, or a contractor or agent of either, shall provide transportation back to the point of hire at the end of each work day.

h. The obligations imposed by this section shall be in addition to those set forth in subsection d. of section 14 of P.L.1981, c.1 (C.56:8-1.1) and any rules or regulations promulgated thereunder.

i. The commissioner may promulgate regulations under this section in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

j. The commissioner may assess a penalty against a temporary help service firm that violates this section or any rules or regulations adopted pursuant to this section of up to $5,000 for each violation, except that the penalty for a violation of the recordkeeping requirements of this section shall not exceed $500 for each violation. Each day that a temporary help service firm fails to comply with this section shall constitute a separate offense. Any penalty assessed under this section shall be collected by the commissioner in a summary proceeding in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

History

L. 2023, c. 10, § 5, effective August 5, 2023.

Annotations

Notes

Editor's Notes

N.J. Stat. § 34:8D-5

L. 2023, c. 10 was enacted in accordance with the Governor's recommendations made on conditional veto of the legislation (Assembly Bill No. 1474).

Effective Dates

Section 16 of L. 2023, c. 10 provides: "This act shall take effect on the 180th day after the date of enactment, except that sections 3 and 10 shall take effect on the 90th day after the date of enactment, provided however that the commissioner and director may take such anticipatory action as deemed necessary prior to the effective date." Chapter 10, L. 2023, was approved on Feb. 6, 2023.

End of Document

N.J. Stat. § 34:8D-6

Current through New Jersey 220th Second Annual Session, L. 2023, c. 107 and J.R. 11

LexisNexis® New Jersey Annotated Statutes > Title 34. Labor and Workers' Compensation (Chs. 1 — 21) > Chapter 8D. Temporary Labor (§§ 34:8D-1 — 34:8D-13)

§ 34:8D-6. Wage payment, temporary help service firm, itemized statement, listing information, certain

a. At the time of payment of wages, a temporary help service firm shall provide each temporary laborer in a designated classification placement with a detailed itemized statement, on the temporary laborer's paycheck stub or on a form approved by the commissioner, listing the following:

(1) the name, address, and telephone number of each third party client at which the temporary laborer worked. If this information is provided on the temporary laborer's paycheck stub, a code for each third party client may be used so long as the required information for each coded third party client is made available to the temporary laborer;

(2) the number of hours worked by the temporary laborer at each third party client each day during the pay period. If the temporary laborer is assigned to work at the same work site of the same third party client for multiple days in the same work week, the temporary help service firm may record a summary of hours worked at that third party client's worksite so long as the first and last day of that work week are identified as well;

(3) the rate of payment for each hour worked, including any premium rate or bonus. Overtime pay shall be paid in accordance with the provisions of subsection b. of section 5 of P.L.1966, c.113 (C.34:11-56a4);

(4) the total pay period earnings;

(5) the amount of each deduction made from the temporary laborer's compensation made by the temporary help service firm, and the purpose for which each deduction was made, including for the temporary laborer's food, equipment, withheld income tax, withheld Social Security deductions, withheld contributions to the State unemployment compensation trust fund and the State disability benefits trust fund, and every other deduction; the current maximum amount of a placement fee which the temporary help service firm may charge to a third party client to directly hire the temporary laborer pursuant to subsection a. of section 7 of P.L.2023, c.10 (C.34:8D-7); and

(6) any additional information required by the commissioner.

For each temporary laborer in a designated classification placement who is contracted to work a single day, the third party client shall, at the end of the work day, provide such temporary laborer with a work verification form, approved by the commissioner, which shall contain the date, the temporary laborer's name, the work location, and the hours worked on that day. Any third party client who violates this section shall be subject to a civil penalty not to exceed $500 for each violation found by the commissioner. The maximum civil penalty shall increase to $2,500 for a second or subsequent violation. Each violation of paragraph 1 of this subsection for each temporary laborer and for each day the violation continues shall constitute a separate and distinct violation. That penalty shall be collected by the commissioner in a summary proceeding in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

b. A third party client shall not withhold or divert the wages of a temporary laborer in a designated classification placement for any reason. Except as otherwise authorized pursuant to this section, a

temporary help service firm shall not withhold or divert the wages of a temporary laborer in a designated classification placement for any reason. A temporary help service firm shall provide each temporary laborer with an annual earnings summary within a reasonable time after the preceding calendar year, but in no case later than February 1 of each year. A temporary help service firm shall, at the time of each wage payment, give notice to temporary laborers in a designated classification placement of the availability of the annual earnings summary or post such a notice in a conspicuous place in the public reception area.

c. At the request of a temporary laborer in a designated classification placement, a temporary help service firm shall hold the daily wages of the temporary laborer and make bi-weekly payments. The wages shall be paid in a single check, or, at the temporary laborer's sole option, by direct deposit or other manner approved by the commissioner, representing the wages earned during the period in accordance with P.L.1965, c.173 (*C.34:11-4.1* et seq.).

Vouchers or any other method of payment which are not negotiable shall be prohibited as a method of payment of wages. Temporary help service firms that make daily wage payments shall provide written notification to all temporary laborers in a designated classification placement of the right to request bi-weekly checks. The temporary help service firm may provide this notice by conspicuously posting the notice at the location where the wages are received by the temporary laborers.

d. No temporary help service firm shall charge any temporary laborer in a designated classification placement for cashing a check issued by the temporary help service firm for wages earned by a temporary laborer who performed work through that temporary help service firm. No temporary help service firm or third party client shall charge any temporary laborer in a designated classification placement for the expense of conducting any consumer report, as that term is defined in the "Fair Credit Reporting Act," (*15 U.S.C. § 1681* et seq.), any criminal background check of any kind, or any drug test of any kind.

e. Temporary laborers in a designated classification placement shall be paid no less than the wage rate stated in the notice as provided in section 3 of *P.L.2023, c.10* (*C.34:8D-3*), for all the work performed on behalf of the third party client in addition to the work listed in the written description.

f.

(1) The total amount deducted for meals and equipment shall not cause the hourly wage of a temporary laborer in a designated classification placement to fall below the State or federal minimum wage, whichever is greater.

(2) A temporary help service firm may deduct the actual market value of reusable equipment provided to a temporary laborer in a designated classification placement by the temporary help service firm which the temporary laborer fails to return, if the temporary laborer provides a written authorization for that deduction at the time the deduction is made. For any additional equipment, clothing, accessories, or other items which are not required by the nature of the work, either by law, custom, or as a requirement of the third party client that a temporary help service firm makes available to temporary laborers in designated classification placements for purchase, the temporary help service firm shall charge no more than actual market value.

(3) A temporary help service firm shall not charge a temporary laborer in a designated classification placement for any meal not consumed by the temporary laborer and, if consumed, no more than the actual cost of a meal. The purchase of a meal shall not be a condition of employment for a temporary laborer in a designated classification placement.

g. A temporary laborer who is contracted by a temporary help service firm to work at a third party client's worksite in a designated classification placement but who is not utilized by the third party client, shall be paid by the temporary help service firm for a minimum of four hours of pay at the agreed upon rate of pay. However, in the event the temporary help service firm contracts the temporary laborer to work at another location during the same shift, the temporary laborer shall be paid by the temporary help service firm for a minimum of two hours of pay at the agreed upon rate of pay.

h. A third party client is required to reimburse a temporary help service firm wages and related payroll taxes for services performed for a third party client by a temporary laborer in a designated classification placement according to payment terms outlined on invoices, service agreements, or stated terms provided by the temporary help service firm. A third party client who fails to comply with this subsection is subject to the penalties provided in section 11 of P.L.2023, c.10 (C.34:8D-11).

The commissioner shall review a complaint filed by a temporary help service firm that makes designated classification placements against a third party client. The commissioner shall review the payroll and accounting records of the temporary help service firm and the third party client for the period in which the violation of P.L.2023, c.10 (C.34:8D-1 et al.) is alleged to have occurred to determine if wages and payroll taxes have been paid to the temporary help service firm and that the temporary laborer has been paid the wages owed.

i. Any temporary help service firm that violates this section shall be subject to a civil penalty not to exceed $500 for each violation found by the commissioner. That penalty shall be collected by the commissioner in a summary proceeding in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

History

L. 2023, c. 10, § 6, effective August 5, 2023.

Annotations

Notes

Editor's Notes

L. 2023, c. 10 was enacted in accordance with the Governor's recommendations made on conditional veto of the legislation (Assembly Bill No. 1474).

Effective Dates

Section 16 of L. 2023, c. 10 provides: "This act shall take effect on the 180th day after the date of enactment, except that sections 3 and 10 shall take effect on the 90th day after the date of enactment, provided however that the commissioner and director may take such anticipatory action as deemed necessary prior to the effective date." Chapter 10, L. 2023, was approved on Feb. 6, 2023.

End of Document

N.J. Stat. § 34:8D-7

Current through New Jersey 220th Second Annual Session, L. 2023, c. 107 and J.R. 11

LexisNexis® New Jersey Annotated Statutes > Title 34. Labor and Workers' Compensation (Chs. 1 — 21) > Chapter 8D. Temporary Labor (§§ 34:8D-1 — 34:8D-13)

§ 34:8D-7. Restriction, temporary laborer, permanent position acceptance, prohibited

a.

(1) No temporary help service firm shall restrict the right of a temporary laborer in a designated classification placement to accept a permanent position with a third party client to whom the temporary laborer has been referred for work, restrict the right of a third party client to offer employment to a temporary laborer, or restrict the right of a temporary laborer to accept a permanent position for any other employment. A temporary help service firm may charge a placement fee to a third party client for employing a temporary laborer in a designated classification placement for whom a contract for work was effected by the temporary help service firm not to exceed the equivalent of the total daily commission rate the temporary help service firm would have received over a 60-day period, reduced by the equivalent of the daily commission rate the temporary help service firm would have received for each day the temporary laborer has performed work for the temporary help service firm in the preceding 12 months.

(2) Any temporary help service firm which charges a placement fee to a third party client for employing a temporary laborer in a designated classification placement shall include on the wage payment and notice form of each affected temporary laborer the maximum amount of a fee that shall be charged to a third party client by the temporary help service firm, and the total amount of actual charges to the third party client for the temporary laborer during each pay period compared to the total compensation cost for the temporary laborer, including costs of any benefits provided. Failure to provide the required information shall constitute a separate violation for each day the temporary help service firm fails to provide the required information. No fee provided for under this section shall be assessed or collected by the temporary help service firm when a temporary laborer in a designated classification placement is offered permanent work following the suspension, revocation, or non-renewal of the temporary help service firm's certification by the director.

b. Any temporary laborer assigned to work at a third party client in a designated classification placement shall not be paid less than the average rate of pay and average cost of benefits, or the cash equivalent thereof, of employees of the third party client performing the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions for the third party client at the time the temporary laborer is assigned to work at the third party client. Each violation of this subsection for each affected temporary laborer shall constitute a separate violation under section 11 of P.L.2023, c.10 (C.34:8D-11).

c. Any temporary help service firm that violates this section shall be subject to a civil penalty not to exceed $5,000 for each violation found by the commissioner. That penalty shall be collected by the commissioner in a summary proceeding in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

d. If a third party client leases or contracts with a temporary help service firm for the services of a temporary laborer in a designated classification requirement, the third party client shall be, with the temporary help service firm, jointly and severally responsible for any violation of this section, including with

respect to relief provided by section 11 of P.L.2023, c.10 (C.34:8D-11) and civil penalties found by the commissioner.

History

L. 2023, c. 10, § 7, effective August 5, 2023.

Annotations

Notes

Editor's Notes

L. 2023, c. 10 was enacted in accordance with the Governor's recommendations made on conditional veto of the legislation (Assembly Bill No. 1474).

Effective Dates

Section 16 of L. 2023, c. 10 provides: "This act shall take effect on the 180th day after the date of enactment, except that sections 3 and 10 shall take effect on the 90th day after the date of enactment, provided however that the commissioner and director may take such anticipatory action as deemed necessary prior to the effective date." Chapter 10, L. 2023, was approved on Feb. 6, 2023.

End of Document

N.J. Stat. § 34:8D-8

Current through New Jersey 220th Second Annual Session, L. 2023, c. 107 and J.R. 11

LexisNexis® New Jersey Annotated Statutes > Title 34. Labor and Workers' Compensation (Chs. 1 — 21) > Chapter 8D. Temporary Labor (§§ 34:8D-1 — 34:8D-13)

§ 34:8D-8. Temporary help service firm, designated classification placements, certified by director

a. A temporary help service firm which is located, operates, or transacts business within this State shall not make any designated classification placements unless it is certified by the director to do so, in accordance with rules adopted by the director and shall be subject to P.L.2023, c.10 (C.34:8D-1 et al.). Each temporary help service firm seeking certification to make designated classification placements shall provide proof of an employer account number issued by the commissioner for the payment of unemployment insurance contributions as required under the "unemployment compensation law," R.S.43:21-1 et seq.; proof of valid workers' compensation insurance in effect at the time of certification covering all of its employees; on a form created by the director, the number of temporary laborers previously in designated classification placements whom the temporary help service firm has placed in a permanent position with a third party client in the preceding 12 months as well as the percentage those permanent placements represent of the total number of temporary laborers in designated classification placements contracted by the temporary help service firm during the same period; and such other information as the director may require pursuant to rules adopted under this section. If, at any time, the workers' compensation insurance coverage for a temporary help service firm that makes designated classification placements lapses, the temporary help service firm shall have an affirmative duty to report the lapse of coverage to the director and the temporary help service firm's certification shall be suspended until the firm's workers' compensation insurance is reinstated. A temporary help service firm shall inform the director of any change or addition to the information required under this subsection within 30 days of the change or addition.

The director shall assess each temporary help service firm seeking certification to make designated classification placements a non-refundable certification fee not exceeding $2,000 per year per temporary help service firm and a non-refundable fee not to exceed $750 per year for each branch office or other location where the temporary help service firm regularly conducts its business, including but not limited to contracting with and recruiting with temporary laborers for designated classification placement services. The fee shall be paid by check or money order, and the director may not refuse to accept a check on the basis that it is not a certified check or a cashier's check. The director may charge an additional fee to be paid by a temporary help service firm that makes designated classification placements if the firm, or any person on the firm's behalf, issues or delivers a check to the director that is not honored by the financial institution upon which it is drawn. The director shall adopt rules for violation hearings and penalties for violations of P.L.2023, c.10 (C.34:8D-1 et al.). The director shall give the commissioner access to any information that the director receives pursuant to this section.

b. It is a violation of P.L.2023, c.10 (C.34:8D-1 et al.) to operate a temporary help service firm that makes designated classification placements without being certified by the director in accordance with subsection a. of this section. The Division of Consumer Affairs in the Department of Law and Public Safety shall create and maintain on its Internet website, accessible to the public:

(1) a list of all certified temporary help service firms in the State that make designated classification placements whose certification is in good standing;

(2) a list of temporary help service firms in the State that make designated classification placements whose certification has been suspended, including the reason for the suspension, the date that the suspension was initiated, and the date, if known, that the suspension is to be lifted; and

(3) a list of temporary help service firms in the State that make designated classification placements whose certification has been revoked, including the reason for the revocation and the date that the certification was revoked.

The director shall assess a penalty against any temporary help service firm that makes designated classification placements and that fails to obtain a certification from the director in accordance with P.L.2023, c.10 (C.34:8D-1 et al.) or any rules adopted under P.L.2023, c.10 (C.34:8D-1 et al.) of $5,000 for each violation. Each day during which a person operates as a temporary help service firm that makes designated classification placements without being certified as a temporary help service firm with the director pursuant to this section shall be a separate and distinct violation of P.L.2023, c.10 (C.34:8D-1 et al.). That penalty shall be collected by the director in a summary proceeding in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

A temporary help service firm that makes designated classification placements shall obtain a surety bond issued by a surety company admitted to do business in this State. The principal sum of the bond shall not be less than $200,000. A copy of the bond shall be filed with the director.

The bond required by this section shall be in favor of, and payable to, the people of the State of New Jersey, and shall be for the benefit of any temporary laborer damaged by the temporary help service firm's failure to pay wages, interest on wages, or fringe benefits, or damaged by violation of this section.

Thirty days prior to the cancellation or termination of any surety bond required by this section, the surety shall send written notice to both the temporary help service firm and the director identifying the bond and the date of the cancellation or termination.

A temporary help service firm that makes designated classification placements shall not conduct any business until it obtains a new surety bond and files a copy of it with the director.

This subsection shall not apply to a temporary help service firm whose temporary laborers are covered by a valid collective bargaining agreement, if the agreement expressly provides for:

(1) Wages;

(2) Hours of work;

(3) Working conditions;

(4) An expeditious process to resolve disputes concerning nonpayment of wages;

(5) Documentation of its current workers' compensation insurance policy in effect for the temporary laborers; and

(6) Compliance with all provisions of this section.

c. The principal executive officer of a temporary help service firm that makes designated classification placements shall certify under oath at the time of certification of the temporary help service firm each year on a form created by the director that:

(1) the signing officer has reviewed the certification form of the temporary help service firm and confirmed the information is true and accurate to the best of the officer's knowledge;

(2) the signing officer has reviewed the recordkeeping practices of the temporary help service firm and confirmed that the recordkeeping practices comply with the requirements of section 4 of P.L.2023, c.10 (C.34:8D-4) to the best of his or her knowledge;

(3) the signing officer has reviewed the temporary help service firm's filing as required by subsection a. of section 8 of P.L.2023, c.10 (C.34:8D-8), related to the placement of temporary laborers in permanent positions with third party clients and has confirmed that those practices comply with the requirements of

section 7 of P.L.2023, c.10 (C.34:8D-7) and section 14 of P.L.1981, c.1 (C.56:8-1.1), to the best of the officer's knowledge;

(4) the signing officer has reviewed the temporary help service firm's practices related to the transportation of temporary laborers and has confirmed that those practices comply with the requirements of section 5 of P.L.2023, c.10 (C.34:8D-5) to the best of the officer's knowledge;

(5) the signing officer has reviewed and is responsible for the surety bond posted by the temporary help service firm and its renewals; and

(6) the signing officer:

(a) is responsible for establishing and maintaining internal controls to comply with the recordkeeping requirements; and

(b) has evaluated the effectiveness of the internal controls.

d. An applicant is not eligible to obtain or renew a certification to operate a temporary help service firm that makes designated classification placements under P.L.2023, c.10 (C.34:8D-1 et al.) if the applicant or any of its officers, directors, partners, or managers or any owner having 25 percent or greater beneficial interest:

(1) has been involved, as owner, officer, director, partner, or manager, of a temporary help service firm the registration or certification of which has been revoked or suspended without being reinstated within the five years immediately preceding the filing of the application; or

(2) is under the age of 18.

e. Every temporary help service firm that makes designated classification placements shall post and keep posted at each location, in a position easily accessible to all employees, notices as supplied and required by the commissioner containing a copy or summary of the provisions of P.L.2023, c.10 (C.34:8D-1 et al.), and a notice which informs the public of a toll-free telephone number operated by the commissioner for temporary laborers in designated classification placements and the public to file wage dispute complaints and other alleged violations by temporary help service firms that make designated classification placements. The notices shall be in English or any other language generally understood in the locale of the temporary help service firm.

f. No temporary help service firm shall be permitted to obtain or renew a certification to make designated classification placements in New Jersey until it has complied with the requirements of this section.

g. Notwithstanding any law, rule, or regulation to the contrary, any person or entity that meets the definition of temporary help service firm and that makes designated classification placements as those terms are defined in section 2 of P.L.2023, c.10 (C.34:8D-2), shall obtain a certification pursuant to this section and otherwise comply with the provisions of P.L.2023, c.10 (C.34:8D-1 et al.), regardless of whether the person or entity is licensed or registered as one or more of the entities identified in section 1 of P.L.1989, c.331 (C.34:8-43).

h. The requirements of this section shall be in addition to those imposed by any other applicable law, rule, or regulation, including section 14 of P.L.1981, c.1 (C.56:8-1.1) and any rules or regulations promulgated thereunder. A temporary help service firm shall not receive a certification under this section unless it is either registered as a temporary help service firm pursuant to section 14 of P.L.1981, c.1 (C.56:8-1.1) and any rules or regulations promulgated thereunder, or licensed or registered as an entity authorized by any other law, rule, or regulation to provide temporary help services.

History

L. 2023, c. 10, § 8, effective August 5, 2023.

Annotations

Notes

Editor's Notes

L. 2023, c. 10 was enacted in accordance with the Governor's recommendations made on conditional veto of the legislation (Assembly Bill No. 1474).

Effective Dates

Section 16 of L. 2023, c. 10 provides: "This act shall take effect on the 180th day after the date of enactment, except that sections 3 and 10 shall take effect on the 90th day after the date of enactment, provided however that the commissioner and director may take such anticipatory action as deemed necessary prior to the effective date." Chapter 10, L. 2023, was approved on Feb. 6, 2023.

End of Document

N.J. Stat. § 34:8D-9

Current through New Jersey 220th Second Annual Session, L. 2023, c. 107 and J.R. 11

LexisNexis® New Jersey Annotated Statutes > Title 34. Labor and Workers' Compensation (Chs. 1 — 21) > Chapter 8D. Temporary Labor (§§ 34:8D-1 — 34:8D-13)

§ 34:8D-9. Violation, uncertified temporary help service firm, contract

It is a violation of P.L.2023, c.10 (C.34:8D-1 et al.) for a third party client to enter into a contract with a temporary help service firm not certified under section 8 of P.L.2023, c.10 (C.34:8D-8), for the assignment of a temporary laborer to a designated classification placement. A third party client shall verify a temporary help service firm's status with the director before entering into a contract with the temporary help service firm for the assignment of a temporary laborer to a designated classification placement, and on March 1 and September 1 of each year.

A temporary help service firm shall provide each of its third party clients with proof of valid certification issued by the director at the time of entering into a contract for the assignment of a temporary laborer to a designated classification placement. A temporary help service firm shall be required to notify, both by telephone and in writing, each temporary laborer it assigns to a designated classification placement and each third party client with whom it has a contract for the assignment of a temporary laborer to a designated classification placement within 24 hours of any denial, suspension, revocation, or non-renewal of its certification by the director. All contracts between any temporary help service firm and any third party client for the assignment of a temporary laborer to a designated classification placement shall be considered null and void from the date any denial, suspension, revocation, or non-renewal of certification becomes effective and until such time as the temporary help service firm becomes certified and considered in good standing by the director as provided in section 8 of P.L.2023, c.10 (C.34:8D-8).

Upon request, the director shall provide to a third party client a list of entities certified as temporary help service firms pursuant to section 8 of P.L.2023, c.10 (C.34:8D-8). A third party client may rely on information provided by the director or maintained on the Division of Consumer Affair's website pursuant to section 8 of P.L.2023, c.10 (C.34:8D-8), and shall be held harmless if such information maintained or provided by the director or the division was inaccurate. Any third party client that violates this section shall be subject to a civil penalty not to exceed $500. Each day during which a third party client contracts with a person operating as a temporary help service firm but not certified as a temporary help service firm under section 8 of P.L.2023, c.10 (C.34:8D-8), shall constitute a separate and distinct offense.

History

L. 2023, c. 10, § 9, effective August 5, 2023.

Annotations

Notes

Editor's Notes

L. 2023, c. 10 was enacted in accordance with the Governor's recommendations made on conditional veto of the legislation (Assembly Bill No. 1474).

Effective Dates

Section 16 of L. 2023, c. 10 provides: "This act shall take effect on the 180th day after the date of enactment, except that sections 3 and 10 shall take effect on the 90th day after the date of enactment, provided however that the commissioner and director may take such anticipatory action as deemed necessary prior to the effective date." Chapter 10, L. 2023, was approved on Feb. 6, 2023.

End of Document

N.J. Stat. § 34:8D-10

Current through New Jersey 220th Second Annual Session, L. 2023, c. 107 and J.R. 11

LexisNexis® New Jersey Annotated Statutes > Title 34. Labor and Workers' Compensation (Chs. 1 — 21) > Chapter 8D. Temporary Labor (§§ 34:8D-1 — 34:8D-13)

§ 34:8D-10. Violation, temporary help service firm, third party client, retaliation, exercising rights granted

a. It is a violation of P.L.2023, c.10 (C.34:8D-1 et al.) for a temporary help service firm or third party client, or any agent of a temporary help service firm or third party client, to retaliate through discharge or in any other manner against any temporary laborer in a designated classification placement for exercising any rights granted under P.L.2023, c.10 (C.34:8D-1 et al.). The termination or disciplinary action by a temporary help service firm against a temporary laborer in a designated classification placement within 90 days of the person's exercise of rights protected under P.L.2023, c.10 (C.34:8D-1 et al.) shall raise a rebuttable presumption of having done so in retaliation for the exercise of those rights. Such retaliation shall subject a temporary help service firm or third party client, or both, to civil penalties pursuant to P.L.2023, c.10 (C.34:8D-1 et al.) or a private cause of action.

b. It is a violation of P.L.2023, c.10 (C.34:8D-1 et al.) for a temporary help service firm or third party client to retaliate against a temporary laborer in a designated classification placement for:

(1) making a complaint to a temporary help service firm, to a third party client, to a co-worker, to a community organization, before a public hearing, or to a State or federal agency that rights guaranteed under P.L.2023, c.10 (C.34:8D-1 et al.) have been violated;

(2) instituting any proceeding under or related to P.L.2023, c.10 (C.34:8D-1 et al.); or

(3) testifying or preparing to testify in an investigation or proceeding under P.L.2023, c.10 (C.34:8D-1 et al.).

c. When the commissioner finds that a temporary help service firm or third party client has violated this section, the commissioner is authorized to assess and collect administrative penalties, up to a maximum of $250 for a first violation and up to a maximum of $500 for each subsequent violation, specified in a schedule of penalties to be promulgated as a rule or regulation by the commissioner in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.). When determining the amount of the penalty imposed because of a violation, the commissioner shall consider factors which include the history of previous violations by the employer, the seriousness of the violation, the good faith of the employer and the size of the employer's business. No administrative penalty shall be levied pursuant to this section unless the commissioner provides the alleged violator with notification of the violation and of the amount of the penalty by certified mail and an opportunity to request a hearing before the commissioner or his designee within 15 days following the receipt of the notice. If a hearing is requested, the commissioner shall issue a final order upon such hearing and a finding that a violation has occurred. If no hearing is requested, the notice shall become a final order upon expiration of the 15-day period. Payment of the penalty is due when a final order is issued or when the notice becomes a final order. Any penalty imposed pursuant to this section may be recovered with costs in a summary proceeding commenced by the commissioner pursuant to "the penalty enforcement law" (N.J.S.2A:58-1 et seq.). Any sum collected as a fine or penalty pursuant to this section shall be applied toward enforcement and administration costs of the Department of Labor and Workforce Development.

History

L. 2023, c. 10, § 10, effective May 7, 2023.

Annotations

Notes

Editor's Notes

L. 2023, c. 10 was enacted in accordance with the Governor's recommendations made on conditional veto of the legislation (Assembly Bill No. 1474).

Effective Dates

Section 16 of L. 2023, c. 10 provides: "This act shall take effect on the 180th day after the date of enactment, except that sections 3 and 10 shall take effect on the 90th day after the date of enactment, provided however that the commissioner and director may take such anticipatory action as deemed necessary prior to the effective date." Chapter 10, L. 2023, was approved on Feb. 6, 2023.

End of Document

N.J. Stat. § 34:8D-11

Current through New Jersey 220th Second Annual Session, L. 2023, c. 107 and J.R. 11

LexisNexis® New Jersey Annotated Statutes > Title 34. Labor and Workers' Compensation (Chs. 1 — 21) > Chapter 8D. Temporary Labor (§§ 34:8D-1 — 34:8D-13)

§ 34:8D-11. Aggrieved person, temporary help service firm, third party client violation, civil action, Superior Court

a. A person aggrieved by a violation of P.L.2023, c.10 (C.34:8D-1 et al.) by a temporary help service firm or a third party client may institute a civil action in the Superior Court, in the county where the alleged offense occurred or where any temporary laborer who is party to the action resides, without regard to exhaustion of any alternative administrative remedies provided in P.L.2023, c.10 (C.34:8D-1 et al.).

A temporary help service firm aggrieved by a violation of P.L.2023, c.10 (C.34:8D-1 et al.) by a third party client may institute a civil action in the Superior Court, in the county where the alleged offense occurred or where the temporary help service firm which is party to the action is located.

An action may be brought by one or more temporary laborers employed by the temporary help service firm for and on behalf of themselves and other temporary laborers similarly situated against the temporary help service firm or a third party client.

Notwithstanding any other relief provided under any other provision of law, a temporary laborer whose rights have been violated under P.L.2023, c.10 (C.34:8D-1 et al.) by a temporary help service firm or a third party client or a temporary help service firm whose rights have been violated under P.L.2023, c.10 (C.34:8D-1 et al.) by a third party client is entitled to the following relief:

(1) in the case of any violation of subsection a. of section 7 of P.L.2023, c.10 (C.34:8D-7) relating to any unlawful restrictions by a temporary help service firm on the right of a temporary laborer to accept a permanent position for any other employment or the right of a third party client to offer such employment to a temporary laborer, $50 for each temporary laborer affected by the temporary help service firm's policy, practice, or agreement and for each day that policy, practice, or agreement is in effect, plus actual damages;

(2) in the case of unlawful retaliation, the greater of all legal or equitable relief as may be appropriate or liquidated damages equal to $20,000 per incident of retaliation, at the selection of the aggrieved temporary laborer, and reinstatement, if appropriate; and

(3) attorney's fees and costs.

b. The right of an aggrieved person to bring an action under this section terminates upon the passing of six years from the final date of employment by the temporary help service firm or the third party client or upon the passing of six years from the date of termination of the contract between the temporary help service firm and the third party client.

History

L. 2023, c. 10, § 11, effective August 5, 2023.

Annotations

Notes

Effective Dates

Section 16 of L. *2023, c. 10* provides: "This act shall take effect on the 180th day after the date of enactment, except that sections 3 and 10 shall take effect on the 90th day after the date of enactment, provided however that the commissioner and director may take such anticipatory action as deemed necessary prior to the effective date." Chapter 10, L. 2023, was approved on Feb. 6, 2023.

End of Document

N.J. Stat. § 34:8D-12

Current through New Jersey 220th Second Annual Session, L. 2023, c. 107 and J.R. 11

LexisNexis® New Jersey Annotated Statutes > Title 34. Labor and Workers' Compensation (Chs. 1 — 21) > Chapter 8D. Temporary Labor (§§ 34:8D-1 — 34:8D-13)

§ 34:8D-12. Director, authority, suspend, revoke, refuse certification; notification

a. The director shall have the authority to deny, suspend, revoke, or refuse to renew any certification issued under section 8 of P.L.2023, c.10 (C.34:8D-8).

b. The director shall notify a temporary help service firm in writing by mail of the denial, suspension of, revocation of, or refusal to renew the certification and the reason for the denial, suspension of, revocation, or refusal. The Division of Consumer Affairs shall update the list of temporary help service firms certified to make designated classification placements on its website to reflect any denial, suspension, revocation or refusal to renew the certification of a temporary help service firm. The director may deny, suspend, revoke, or refuse to renew any certification issued under section 8 of P.L.2023, c.10 (C.34:8D-8) on the following grounds:

(1) The temporary help service firm is in default of payment of the certification fee required under section 8 of P.L.2023, c.10 (C.34:8D-8), fails to obtain or maintain or terminates the surety bond required under section 8 of P.L.2023, c.10 (C.34:8D-8), or otherwise fails to comply with the requirements under section 8 of P.L.2023, c.10 (C.34:8D-8);

(2) The certification required under section 8 of P.L.2023, c.10 (C.34:8D-8) was procured by fraud or false representation of fact;

(3) The temporary help service firm is subject to a court order entering final judgment for violations of P.L.2023, c.10 (C.34:8D-1 et al.) or for violations of P.L.1966, c.113 (C.34:11-56a et seq.) and the judgment was not satisfied within 30 days of either:

(a) the expiration of the time for filing an appeal from the final judgment order; or

(b) if a timely appeal was made, the date of the final resolution of that appeal and any subsequent appeals resulting in final judicial affirmation of the findings of a violation;

(4) The temporary help service firm has failed to comply with the terms of an administrative penalty or final order, within 30 days of issuance of that penalty or order, issued by the commissioner or the director pursuant to P.L.2023, c.10 (C.34:8D-1 et al.) or issued by the commissioner pursuant to P.L.1966, c.113 (C.34:11-56a et seq.) for which all appeal rights have been exhausted;

(5) The temporary help service firm has been determined through a separate enforcement process to be operating in violation of any law; or

(6) The temporary help service firm has committed one or more violations of P.L.2023, c.10 (C.34:8D-1 et al.), that have jeopardized the public health, safety, or welfare, or that call into question the firm's ability to operate as a temporary help service firm in compliance with P.L.2023, c.10 (C.34:8D-1 et al.).

c. If a temporary help service firm's application for initial registration or renewal is denied pursuant to section 14 of P.L.1981, c.1 (C.56:8-1.1) or any rules or regulations promulgated thereunder, or if a temporary help service firm's registration is suspended, revoked, or not renewed for any reason, the director shall take the same action against the temporary help service firm with respect to an application or a certification under section 8 of P.L.2023, c.10 (C.34:8D-8). If a person or entity that holds or seeks a

license or registration that authorizes the person or entity to provide temporary help services pursuant to any other law, rule, or regulation is denied such license or registration, or if such license or registration is suspended, revoked, or not renewed for any reason, the director shall take the same action against the temporary help service firm with respect to an application or a certification under section 8 of P.L.2023, c.10 (C.34:8D-8).

d. The director shall not deny, revoke, or refuse to renew a certification under this section except upon reasonable notice to, and opportunity to be heard by, the applicant or certification-holder. The director may, if the director finds it to be in the public interest, suspend a certification for any period of time that the director determines to be proper, or assess a penalty in lieu of suspension, or both, and may issue a new certification, notwithstanding the revocation of a prior certification, provided the director finds the applicant to have become entitled to a new certification.

History

L. 2023, c. 10, § 12, effective August 5, 2023.

Annotations

Notes

Editor's Notes

L. 2023, c. 10 was enacted in accordance with the Governor's recommendations made on conditional veto of the legislation (Assembly Bill No. 1474).

Effective Dates

Section 16 of L. 2023, c. 10 provides: "This act shall take effect on the 180th day after the date of enactment, except that sections 3 and 10 shall take effect on the 90th day after the date of enactment, provided however that the commissioner and director may take such anticipatory action as deemed necessary prior to the effective date." Chapter 10, L. 2023, was approved on Feb. 6, 2023.

End of Document

N.J. Stat. § 34:8D-13

Current through New Jersey 220th Second Annual Session, L. 2023, c. 107 and J.R. 11

LexisNexis® New Jersey Annotated Statutes > Title 34. Labor and Workers' Compensation (Chs. 1 — 21) > Chapter 8D. Temporary Labor (§§ 34:8D-1 — 34:8D-13)

§ 34:8D-13. Rights, obligations

The rights and obligations established by P.L.2023, c.10 (C.34:8D-1 et al.) shall be in addition to those set forth in P.L.1960, c.39 (C.56:8-1 et seq.) and any rules or regulations promulgated thereunder; P.L.1989, c.331 (C.34:8-43 et seq.) and any other applicable law, rule, or regulation.

History

L. 2023, c. 10, § 14, effective August 5, 2023.

Annotations

Notes

Editor's Notes

L. 2023, c. 10 was enacted in accordance with the Governor's recommendations made on conditional veto of the legislation (Assembly Bill No. 1474).

Effective Dates

Section 16 of L. 2023, c. 10 provides: "This act shall take effect on the 180th day after the date of enactment, except that sections 3 and 10 shall take effect on the 90th day after the date of enactment, provided however that the commissioner and director may take such anticipatory action as deemed necessary prior to the effective date." Chapter 10, L. 2023, was approved on Feb. 6, 2023.

End of Document

Filed July 21, 2023

LABOR AND WORKFORCE DEVELOPMENT

DIVISION OF WAGE AND HOUR COMPLIANCE

Temporary Laborers

New Rules: N.J.A.C. 12:72

Authorized By: _____

Robert Asaro-Angelo, Commissioner

Department of Labor and Workforce Development

Authority: N.J.S.A. 34:1-20; 34:1A-3(e); 34:8D-5(i); and 34:8D-10(c).

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

Proposal Number: PRN 2023 - _____

Submit written comments by _____ to:

David Fish, Executive Director

Legal and Regulatory Services

NJ Department of Labor and Workforce Development

P.O. Box 110 – 13th Floor

Trenton, New Jersey 08625-0110

david.fish@dol.nj.gov

The agency proposal follows:

Summary

The Department is proposing new rules at N.J.A.C. 12:72, in order to implement Sections 1 through 7, and Section 10, of P.L. 2023, c. 10 (N.J.S.A. 34:8D-1 et seq.),

commonly referred to as the Temporary Workers' Bill of Rights. The above cited sections of the Temporary Workers' Bill of Rights are enforced by the Department of Labor and Workforce Development and will be referred to hereafter as "the Act." The Division of Consumer Affairs, within the Department of Law and Public Safety, which is responsible for enforcing other sections of the Temporary Workers' Bill of Rights, will be promulgating its own rules to implement those sections of the law.

The Act applies to temporary help service firms, third-party clients of temporary help service firms, and temporary laborers employed by temporary help service firms who are assigned to designated classification placements with third-party clients. Specifically, the Act imposes requirements and restrictions on temporary help service firms relative to the temporary laborers who they employ. These requirements and restrictions fall into the following categories:

(1) **Notifications**, including an assignment notification delivered to the temporary laborer at the time of dispatch; a notice of change on a multi-day assignment in the schedule, shift or location; notice of a strike, lockout, or other labor dispute and the right to refuse an assignment where such a strike, lockout or other labor dispute exists; and a confirmation of having sought work;

(2) Rights and restrictions relative to the providing of **transportation** to temporary laborers, including a prohibition against requiring a temporary laborer to use transportation provided by the temporary help service firm or by another provider of transportation services; a prohibition against a temporary laborer being charged a fee by the temporary help service firm or a third-party client, or a contractor or agent of either, for transportation to or from the worksite; certain

restrictions regarding the referral of temporary laborers to any person for transportation to or from a worksite; certain requirements pertaining to the safety of motor vehicles used to transport temporary laborers to or from a worksite; and a requirement that, unless the temporary laborer requests otherwise, when the temporary laborer has been transported to a worksite, the temporary help service firm or third-party client, or contractor or agent of either, must provide transportation of the temporary laborer back to the point of hire at the end of the day;

(3) Prohibitions pertaining to **post employment restrictions**, including a cap on the **placement fee** that a temporary help service firm may charge a third-party client when the third-party client employs a temporary laborer who had been assigned by the temporary help service firm to perform work for the third-party client;

(4) A **pay equity** requirement, whereby temporary help service firms must provide each temporary laborer with pay and benefits equal to or greater than the average rate of pay and average cost of benefits for employees of the third-party client to which the temporary laborer is assigned, who are performing the same or substantially similar work to that of the temporary laborer at the time the temporary laborer is assigned to the third-party client, on a job the performance of which requires equal skill, effort, and responsibility to that of the temporary laborer, and which is performed under similar working conditions;

(5) Various restrictions relating to **charges and payroll deductions** for such things as unreturned reusable equipment; additional equipment, clothing,

accessories, or other items which are not required by the nature of the work, that are made available for purchase; meals; consumer reports, criminal background checks and drug tests;

(6) Other requirements, including providing to temporary laborers a **detailed itemized statement** at the time of payment and an **annual earnings summary** for the prior calendar year no later than February 1 of the current calendar year; the **holding of daily wages in favor of bi-weekly payments** at the request of a temporary laborer; various requirements regarding **time and mode of payment**; and the making of **non-utilization payments** to temporary laborers when they are contracted to work and are not utilized or when their worksite is changed.

The Act also contains recordkeeping requirements for both temporary help service firms and third-party clients, as well as a prohibition against retaliation through discharge or in any other manner by a temporary help service firm or third-party client, or an agent of either, against a temporary laborer for exercising any rights granted the temporary laborer under the Act.

Finally, the Act contains a requirement that a third-party client must reimburse a temporary help service firm the wages and related payroll taxes for services performed for the third-party client by a temporary laborer, according to payment terms outlined in invoices, service agreements, or stated terms provided by the temporary help service firm. The Act states that when a third-party client has failed to make the required wage or related payroll tax payments to the temporary help service firm, the temporary help service firm may file a complaint with the Commissioner.

To implement the Act, the Department is proposing new rules at N.J.A.C. 12:72, which would include the following subchapters:

Proposed new N.J.A.C. 12:72-1 would contain general provisions, including the purpose and scope of the chapter and sections that address violations, administrative penalties, hearings, the Act's prohibition against retaliation, and the process for filing a complaint alleging a violation of either the Act or this chapter with the Division of Wage and Hour Compliance within the Department of Labor and Workforce Development.

Proposed new N.J.A.C. 12:72-2 would define the words and terms used throughout the chapter.

Proposed new N.J.A.C. 12:72-3 would address the notification requirements of the Act, delineating what must be contained in the assignment notification statement at the time of dispatch, indicating where on the Department's website the assignment notification statement form may be found, describing the manner in which the assignment notification statement must be provided to temporary laborers; describing the notice of change for multi-day assignments; setting forth the requirement that temporary laborers receive notice when a strike, lockout or other labor dispute exists and that they have a right to refuse the assignment; setting forth the requirement that a temporary laborer who is not placed with a third-party client or otherwise contracted to work must, upon the temporary laborer's request, be provided with written confirmation that the temporary laborer sought work on that day; and, finally, addressing the statutory requirement that all notifications be made available to temporary laborers in Spanish or in any other language that is generally understood in the locale of the temporary help service firm.

Proposed new N.J.A.C. 12:72-4 would describe the recordkeeping requirements under the Act both for temporary help service firms and their third-party clients. The new subchapter would also describe which records must be made available for inspection by the Commissioner and when those records must be made available for inspection by the Commissioner, as well as which records must be made available for copying at no cost to temporary laborers or their authorized representatives and when those records must be made available for copying at no cost to temporary laborers or their authorized representatives.

Proposed new N.J.A.C. 12:72-5 would set forth the Act's requirements and restrictions regarding transportation of temporary laborers to and from the worksite, including the prohibition against requiring a temporary laborer to use transportation provided by the temporary help service firm or by another provider of transportation services; the prohibition against a temporary laborer being charged a fee by the temporary help service firm or a third-party client, or a contractor or agent of either, for transportation to or from the worksite; the Act's restrictions regarding the referral of temporary laborers to any person for transportation to or from a worksite; the Act's requirements pertaining to the safety of motor vehicles used to transport temporary laborers to or from a worksite; and the requirement that, unless the temporary laborer requests otherwise, when the temporary laborer has been transported to a worksite, the temporary help service firm or third-party client, or contractor or agent of either, must provide transportation of the temporary laborer back to the point of hire at the end of the day.

Proposed new N.J.A.C. 12:72-6 would address the Act's provisions regarding post-employment restrictions and its cap on the charging by temporary help service firms to its third-party clients of a placement fee when the third-party client employs a temporary laborer who had been assigned by the temporary help service firm to perform work for the third-party client.

Proposed new N.J.A.C. 12:72-7 would contain the Act's pay equity requirement, whereby a temporary help service firm is required to provide temporary laborers with pay and benefits that are equal to or greater than the average rate of pay and average cost of benefits of comparator employees of the third-party client; it would describe in detail the method for calculating the hourly rate of pay that the temporary help service firm must pay the temporary laborer based on the average rate of pay and average cost of benefits provided to the third-party client's comparator employees; and it would delineate how to determine whether a temporary laborer and third-party client employee are performing substantially similar work.

Proposed new N.J.A.C. 12:72-8 would describe the Act's restrictions relating to charges and payroll deductions for such things as unreturned reusable equipment; additional equipment, clothing, accessories, or other items which are not required by the nature of the work, that are made available for purchase; meals; consumer reports, criminal background checks and drug tests.

Proposed new N.J.A.C. 12:72-9 would address other of the Act's temporary help service firm responsibilities, third-party client responsibilities, and temporary laborer protections, such as the requirement that temporary laborers be provided a detailed itemized statement at the time of payment as well as an annual earnings summary for

the prior calendar year no later than February 1 of the current calendar year; that temporary laborers must be given the option of having the temporary help service firm hold their daily wages in favor of bi-weekly payments; that temporary help service firms must adhere to all of the requirements of N.J.A.C. 12:55-2.4 regarding time and mode of payments; and that temporary help service firms make non-utilization payments to temporary laborers when they are contracted to perform work for a third-party client, but are not utilized, or are sent to a different worksite.

Proposed new N.J.A.C. 12:72-10 would address both the Act's requirement that a third-party client reimburse the temporary help service firm wages and related payroll taxes for services performed for the third-party client by a temporary laborer, and the Act's requirement that the Commissioner be available to receive complaints by temporary help service firms to which third-party clients have not made such reimbursements. The Act does not authorize the Commissioner to issue an administrative penalty or take any remedial action against a third-party client for failure of the third-party client to pay wages or payroll taxes to the temporary help service firm. Consequently, proposed new N.J.A.C. 12:72-10 would provide temporary help service firms the option to file a complaint with the Commissioner against the third-party client as required by the Act, and would empower the Commissioner to issue a determination based on that complaint. However, for temporary help service firms that seek a remedy against the third-party client, the proposed rule would direct those aggrieved temporary help service firms to file an action with a court of competent jurisdiction.

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

Social Impact

The vast majority of the proposed new rules either mirror the Act or are necessitated by the Act. Therefore, whatever positive or negative social impact might be felt would derive in the first instance from the Act and not the proposed new rules. As to the remainder of the new rules, it is the Department's belief that they would have a positive social impact, in that they would minimize any possible confusion as to who is covered by the Act, what activities are prohibited and what sanctions may be imposed under the Act. The proposed new rules would also provide detailed guidance to the regulated community as to how to comply with the Act. For example, regarding the Act's imposition of a cap on the placement fee that may be charged by a temporary help service firm to a third-party client when the third-party client employs a temporary laborer who had been assigned by the temporary help service firm to perform work for the third-party client, the Department has, within proposed new N.J.A.C. 12:72-6.2(c), provided **step-by-step** instructions as to how a temporary help service firm should calculate the maximum placement fee. Similarly, regarding the Act's pay equity requirement, whereby a temporary help service firm is required to provide the temporary laborer with pay and benefits that are equal to or greater than the average rate of pay and average cost of benefits being provided by the third-party client to employees who are performing the same or substantially similar work to that of the temporary laborer, the Department has, within proposed new N.J.A.C. 12:72-7.3, provided important

guidance regarding how one would determine whether a temporary laborer and an employee of a third-party client are performing substantially similar work. Within proposed new N.J.A.C. 12:72-7.2, the Department has also provided **step-by-step** instructions as to how a temporary help service firm would calculate the hourly rate of pay that the temporary help service firm must pay the temporary laborer based on the average rate of pay and average cost of benefits of comparator employees of the third-party client.

Furthermore, the proposed new rules would have a positive social impact in that they would establish a process for the assessment of penalties and the hearing of appeals, thereby enabling the Department to effectively enforce the law. Finally, the proposed new rules would have an overall positive social impact in that they would provide a regulatory framework for the Department's administration of an Act that has as its purpose the protection of a class of workers; specifically, temporary laborers. In that the Act's provisions will provide temporary laborers and their families with a greater degree of economic security and peace of mind, the proposed new rules would have the same positive social impact.

Economic Impact

As indicated in the Social Impact statement above, the vast majority of the proposed new rules either mirror the Act or are necessitated by the Act. Therefore, whatever positive or negative economic impact might be felt, including by temporary laborers, temporary help service firms and third-party clients of temporary help service firms, would derive in the first instance from the Act, not the proposed new rules. That portion of the new rules which addresses the levying of penalties by the Department

against those who violate the Act would, of course, have a negative economic impact upon those temporary help service firms and third-party clients who run afoul of the Act. As to the remainder of the new rules, it is the Department's belief that they would have a positive economic impact in that they would minimize any possible confusion as to who is covered by the Act, what conduct is prohibited under the Act, and how temporary help service firms and third-party clients may comply with the Act, among other important issues. It is the Department's hope that minimizing confusion as to these issues will avoid costs for those impacted by the Act of unnecessary litigation, which might otherwise result.

Federal Standards Statement

The proposed new rules do not exceed standards or requirements imposed by Federal law as there are currently no Federal standards or requirements applicable to the subject matter of this rulemaking. As a result, a Federal standards analysis is not required.

Jobs Impact

To the extent that the protections afforded to temporary laborers under the Act and the proposed new rules might result in third-party clients of temporary help service firms determining that it would be more advantageous for them to hire permanent employees than to continue using temporary labor, the Department does anticipate that the Act and the proposed new rules may result in the generation of permanent jobs.

Agriculture Industry Impact

The Department does not anticipate that the proposed new rules would have any impact on the agriculture industry in that the impact of the proposed new rules should be limited to those occupational groupings, and related industries, that are listed in the

statutory definition for the term "temporary laborer." That definition includes a listing of occupational groupings, and corresponding United States Department of Labor, Bureau of Labor Statistics (BLS) codes, for food preparation and serving related occupations; building and grounds cleaning and maintenance; personal care and service occupations; construction laborers; helpers, construction trades; installation, maintenance, and repair occupations; production occupations; transportation and material moving occupations; and other protective service workers. It does **not** include 45-0000 Farming, Fishing, and Forestry, which encompasses the following: first-line supervisors of farming, fishing, and forestry workers; agricultural inspectors; animal breeders; graders and sorters, agricultural products; agricultural workers, all other; agricultural equipment operators; farm workers, farm, ranch and aquacultural animals; farmworkers and laborers, crop, nursery, and greenhouse; forest and conservation workers; logging workers, all other; log graders and scalers; fallers; and logging equipment operators. Thus, again, the proposed new rules should have no impact on the agriculture industry.

Regulatory Flexibility Analysis

It is not possible at this time to estimate how many businesses with fewer than 100 full-time employees may be impacted by the Act and these rules. This is because the term "designated classification placement," defined within the Act to mean an assignment of a temporary laborer by a temporary help service firm to perform work in a particular set of occupational categories, is unique to the Act, which was just signed into law earlier this year. Consequently, there is no data available that would permit the Department to identify which temporary help service firms make such "designated

classification placements." Nevertheless, to the extent that *any* temporary help service firms in the business of making "designated classification placements," as that term is defined in the Act, also meet the definition of "small employer" within the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. (resident in this State, independently owned and operated, not dominant in its field, and employs fewer than 100 full-time employees), the proposed new rules would impose recordkeeping and compliance requirements on those small businesses. The records that a temporary help service firm or third-party client must keep under the proposed new rules (as mandated by the Act), are basic employment and business records that the temporary help service firm should already be keeping, such as the name and contact information of its employees, the name and contact information of its clients, the dates on which contracts for services were entered into with clients, the dates on which services were rendered to clients by employees, hours worked by employees, hours billed to clients, employee wages paid, copies of contracts, copies of invoices, and a record of deductions made from employee wages. As to compliance requirements, as described in in the Summary above, they include the notification requirements, the transportation requirements, the post-employment restrictions and related placement fee cap, the pay equity requirements, the employee charge and payroll deduction restrictions, and the non-utilization payment requirement, among others. By providing within the proposed new rules the types of step-by-step instructions for compliance that are described in the Social Impact statement, it is the Department's hope that it is eliminating confusion surrounding compliance with the Act, which in turn, it is hoped, is minimizing possible adverse impact on affected businesses, including small businesses. Otherwise, the

recordkeeping and compliance requirements contained in the proposed new rules are expressly dictated by the Act, from which the Department has no discretion to deviate based upon the size of a business or for any other reason.

Housing Affordability Impact Analysis

The proposed new rules would not evoke a change in the average costs associated with housing. The basis for this finding is that the proposed new rules pertain to the working conditions of temporary laborers. The proposed new rules do not pertain to housing.

Smart Growth Development Impact Analysis

The proposed new rules would not evoke a change in the housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed new rules pertain to the working conditions of temporary laborers. The proposed new rules do not pertain to housing production, either within Planning Areas 1 or 2, within designated centers, or anywhere in the State of New Jersey.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The Commissioner has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

Full text of the proposed new rules follows:

CHAPTER 72 TEMPORARY LABORERS

SUBCHAPTER 1 GENERAL PROVISIONS

12:72-1.1 Purpose and scope

(a) The purpose of this chapter is to implement N.J.S.A. 34:8D-1 through 7, and 10 (the Act), which contain workplace protections, as well as temporary help service firm and third-party client responsibilities, that are enforced by the Department of Labor and Workforce Development for the benefit of temporary laborers.

(b) This chapter is applicable to each temporary help service firm that is located, operates, or transacts business within New Jersey.

(c) This chapter is applicable to each temporary laborer who is employed by a temporary help service firm referred to in (b) above, who also either:

1. Has been assigned by the temporary help service firm to work in a designated classification placement within New Jersey, or

2. Has been assigned by the temporary help service firm to work in a designated classification outside of New Jersey, but who has his or her primary residence in New Jersey.

(d) This chapter applies to each third-party client that contracts with a temporary help service firm referred to in (b) above, for the services of a temporary laborer referred to in (c) above.

12:72-1.2 Retaliation prohibited

(a) No temporary help service firm or third-party client, or agent of a temporary help service firm or third-party client, shall retaliate through discharge or in any other manner against a temporary laborer for exercising any rights granted the temporary laborer under N.J.S.A. 34:8D-1 et seq., or this chapter, including but not limited to, the following:

1. Making a complaint to a temporary help service firm, to a third-party client, to a co-worker, to a community organization, before a public hearing, or to a State or federal agency that rights guaranteed under N.J.S.A. 34:8D-1 et seq., have been violated;

2. Instituting any proceeding under or related to N.J.S.A. 34:8D-1 et seq.; and

3. Testifying or preparing to testify in an investigation or proceeding under N.J.S.A. 34:8D-1 et seq.

(b) When within 90 days of the temporary laborer's exercise of rights protected under N.J.S.A. 34:8D-1 et seq., a temporary help service firm either terminates the temporary laborer's employment or takes any disciplinary action against the temporary laborer, there shall arise a rebuttable presumption that the termination or other disciplinary action was in retaliation for the temporary laborer's exercise of rights.

12:72-1.3 Administrative penalties

(a) When the Commissioner finds that a temporary help service firm has violated any requirement(s) contained in N.J.S.A. 34:8D-3 or N.J.A.C. 12:72-3.1 through 3.5, the

Commissioner is authorized to assess and collect an administrative penalty against the temporary help service firm for each violation in an amount not less than $500 and not to exceed $1,000.

(b) When the Commissioner finds that a third-party client has violated any requirement(s) contained in N.J.S.A. 34:8D-4(a)(2) or N.J.A.C. 12:72-4.2, the Commissioner is authorized to assess and collect an administrative penalty against the third-party client for each violation in an amount not to exceed $500.

1. The third-party client's failure to remit accurate time records to the temporary help service firm as required in N.J.S.A. 34:8D-4(a)(2) or N.J.A.C. 12:72-4.2 shall not constitute a violation of that law or that rule and shall not be the basis for the assessment or collection of an administrative penalty against the third-party client when the third-party client has been precluded from submitting those time records for reasons beyond its control.

(c) When the Commissioner finds that a temporary help service firm has violated the requirement contained in N.J.S.A. 34:8D-5(d)(2) or N.J.A.C. 12:72-4.1(b), that it obtain, and keep on file, documentation that any provider of transportation to temporary laborers with which the temporary help service firm contracts or to which the temporary help service firm makes referrals, is in compliance with N.J.S.A. 34:8D-5(e), (f), and (g), the Commissioner is authorized to assess and collect an administrative penalty against the temporary help service firm for each violation in an amount not to exceed $500.

(d) When the Commissioner finds that a temporary help service firm has violated any requirement(s) contained in N.J.S.A. 34:8D-5 (with the exception of N.J.S.A. 34:8D-5(d)(2)), or N.J.A.C. 12:72-5.1 through 5.5, the Commissioner is authorized to assess

and collect an administrative penalty against the temporary help service firm for each violation in an amount not to exceed $5,000.

(e) When the Commissioner finds that a temporary help service firm has violated any requirement(s) contained in N.J.S.A. 34:8D-6 or N.J.A.C. 12:72-8.1 through 8.4, or N.J.A.C. 12:72-9.1 through 9.7, the Commissioner is authorized to assess and collect an administrative penalty against the temporary help service firm for each violation in an amount not to exceed $500.

(f) When the Commissioner finds that a third-party client has violated the work verification requirement contained in N.J.S.A. 34:8D-6(a) or N.J.A.C. 12:72-9.2, the Commissioner is authorized to assess and collect an administrative penalty against the third-party client for each violation in the following amounts:

1. First violation – not to exceed $500;

2. Second and subsequent violations – not to exceed $2,500.

(g) When the Commissioner finds that a temporary help service firm has violated any requirement(s) contained in N.J.S.A. 34:8D-7 or N.J.A.C. 12:72-6.1, 6.2, 7.1 or 7.2, the Commissioner is authorized to assess and collect an administrative penalty against the temporary help service firm for each violation in an amount not to exceed $5,000.

1. If a third-party client leases or contracts with a temporary help service firm for the services of a temporary laborer, the third-party client and the temporary help service firm shall be jointly and severally responsible for a violation of the requirements contained in N.J.S.A. 34:8D-7 or N.J.A.C. 12:72-6.1, 6.2, 7.1 or 7.2, including with respect to any administrative penalty assessed by the Commissioner under this subsection for any such violation(s).

(h) When the Commissioner finds that a temporary help service firm or third-party client has violated any requirement(s) contained in N.J.S.A. 34:8D-10 or N.J.A.C. 12:72-1.2, the Commissioner is authorized to assess and collect an administrative penalty against the temporary help service firm or the third-party client, as appropriate, for each violation in the following amounts:

1. First violation – not to exceed $250;

2. Second and subsequent violations – not to exceed $500.

(i) In assessing an administrative penalty under this section, the Commissioner shall consider the following factors, where applicable, in determining what constitutes an appropriate penalty for the particular violation(s):

1. The seriousness of the violation(s);

2. The past history of violations by the temporary help service firm or third-party client, as appropriate;

3. The good faith of the temporary help service firm or third-party client, as appropriate;

4. The size of the temporary help service firm's or third-party client's business, as appropriate; and

5. Any other factors that the Commissioner deems appropriate in determining the penalty assessed.

12:72-1.4 Hearings

(a) When the Commissioner assesses an administrative penalty under N.J.A.C. 12:72-1.3, the temporary help service firm or third-party client against which the

administrative penalty has been assessed shall have the right to a hearing under (b) below.

(b) No administrative penalty shall be levied under N.J.A.C. 12:72-1.3 unless the Commissioner provides the alleged violator with notification by certified mail of the violation and the amount of the penalty and an opportunity to request a formal hearing. A request for a formal hearing must be received within 15 business days following receipt of the notice. All hearings shall be held pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and the Uniform Administrative Procedures Rules, N.J.A.C. 1:1.

(c) All requests for hearing will be reviewed by the Division of Wage and Hour and Contract Compliance to determine if the dispute may be resolved at an informal settlement conference. If following its review, the Division determines that an informal settlement conference is warranted, such conference will be scheduled. If a settlement cannot be reached, the case will be forwarded to the Office of Administrative law for a formal hearing.

(d) The Commissioner shall make the final decision of the Department.

(e) If the temporary help service firm or third-party client fails to request a formal hearing within 15 days following receipt of the notice, the notice shall become a final order.

(f) Appeals of the final decision of the Commissioner under (d) above or a final order under (e) above shall be made to the Appellate Division of the New Jersey Superior Court.

12:72-1.5 Processing of complaints

(a) Any complaint filed with the Division that alleges a violation of the Act or this chapter shall be processed in the same manner as a complaint filed with the Division under the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a et seq., and the rules promulgated thereunder.

SUBCHAPTER 2 DEFINITIONS

12:72-2.1 Definitions

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

"Act" means N.J.S.A. 34:8D-1 through 7, and 10.

"Benefits" means employee fringe benefits, including but not limited to, health insurance, life insurance, disability insurance, paid time off (including vacation, holidays, personal leave and sick leave in excess of what is required by law) training, and pension. The term "benefits" does not include employee fringe benefits that an employer is required by law to provide to its employees (e.g., earned sick leave under N.J.S.A. 34:11D-1 et seq.).

"Commissioner" means the Commissioner of the Department of Labor and Workforce Development or their designee.

"Comparator employee" means an employee of the third-party client to which the temporary laborer is assigned, who is performing the same or substantially similar work to that of the temporary laborer at the time the temporary laborer is assigned to the

third-party client, on a job the performance of which requires equal skill, effort, and responsibility to that of the temporary laborer, and which is performed under similar working conditions.

"Division" means the Division of Wage and Hour and Contract Compliance.

"Employ" means to suffer or permit to work for compensation, including by means of ongoing contractual relationships in which the employer retains substantial direct or indirect control over the employee's employment opportunities or terms and conditions of employment.

"Employer" means any person or corporation, partnership, individual proprietorship, joint venture, firm, company, or other similar legal entity who engages the services of an employee and who pays the employee's wages, salary, or other compensation, or any person acting directly or indirectly in the interest of an employer in relation to an employee.

"Hours worked" means all of the time that the employee is required to be at the employee's place of work or on duty. Nothing in N.J.S.A. 34:8D-1 et seq., requires an employer to pay an employee for hours the employee is not required to be at the employee's place of work because of holidays, vacation, lunch hours, illness, and similar reasons.

"Designated classification placement" means an assignment of a temporary laborer by a temporary help service firm to perform work in any of the following occupational categories as designated by the Bureau of Labor Statistics of the United States Department of Labor:

33-9099 Other Protective Service Workers;

35-0000 Food Preparation and Serving Related Occupations;

37-0000 Building and Grounds Cleaning and Maintenance Occupations;

39-0000 Personal Care and Service Occupations;

47-2060 Construction Laborers;

47-3019 Helpers, Construction Trades;

49-0000 Installation, Maintenance, and Repair Occupations;

51-0000 Production Occupations;

53-0000 Transportation and Material Moving Occupations

"Person" means any natural person or their legal representative, partnership, corporation, company, trust, business entity, or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee, or beneficiary of a trust thereof.

"Primary residence" means a dwelling where a person usually lives and does not include second homes. A person may only have one primary residence at any given time.

"Temporary laborer" means a person who contracts for employment in a designated classification placement with a temporary help service firm. Temporary laborer does not include agricultural crew leaders who are registered under the federal Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 et seq., N.J.S.A. 34:8A-7 et seq., or N.J.S.A. 34:9A-1 et seq.

"Temporary help service firm" means any person or entity who operates a business which consists of employing individuals directly or indirectly for the purpose of assigning the employed individuals to assist the firm's customers in the handling of the

customer's temporary, excess or special workloads, and who, in addition to the payment of wages or salaries to the employed individuals, pays federal social security taxes and State and federal unemployment insurance; carries workers' compensation insurance as required by State law; and sustains responsibility for the actions of the employed individuals while they render services to the firm's customers. A temporary help service firm is required to comply with the provisions of N.J.S.A. 56:8-1 et seq.

"Third-party client" means any person who contracts with a temporary help service firm for obtaining temporary laborers in a designated classification placement. The term, "third-party client," does not include the State or any office, department, division, bureau, board, commission, agency, or political subdivision thereof that utilizes the services of temporary help service firms.

SUBCHAPTER 3 REQUIRED NOTICES FROM TEMPORARY HELP SERVICE FIRM TO TEMPORARY LABORER

12:72-3.1 Assignment notification statement at dispatch

(a) At the time a temporary help service firm dispatches a temporary laborer to work in a designated classification placement, the temporary help service firm shall provide the temporary laborer with an assignment notification statement using the form made available at that time on the Department website at https://www.nj.gov/labor/wageandhour/.

1. The Commissioner will not accept applications from temporary help service firms for approval of other assignment notification statement forms.

2. The Commissioner, using the Department website in the manner described in (a) above, will publish a single approved assignment notification form, which the Commissioner may amend from time to time.

(b) The assignment notification statement in (a) above shall be provided by the temporary help service firm to the temporary laborer in English and in the language identified by the employee as the employee's primary language.

(c) The assignment notification statement in (a) above shall be provided by the temporary help service firm to the temporary laborer in a manner appropriate to whether the assignment is accepted at the temporary help service firm's office, or remotely by telephone, text, email, or other electronic exchange.

1. Where the assignment is accepted and dispatch to the assignment occurs remotely by text, email or other electronic exchange, the temporary help service firm shall provide the temporary laborer with the assignment notification statement (and obtain acknowledgment of receipt of the assignment notification statement if the temporary help service firm intends to do so) by text, email or other electronic exchange, and may not require the temporary laborer to travel to the office of the temporary help service firm solely to receive or acknowledge receipt of the assignment notification statement.

2. Where the assignment is accepted and dispatch to the assignment occurs remotely by telephone, the temporary help service firm shall provide the temporary laborer the option of receiving the assignment notification statement (and acknowledging receipt of the assignment notification statement if the temporary help service firm intends to do so) either (i) by text, email or other

electronic exchange, or (ii) by traveling to the office of the temporary help service firm and receiving (and acknowledging receipt of) the assignment notification statement in person.

3. Where the assignment is accepted and dispatch to the assignment occurs in person at the office of the temporary help service firm, the temporary help service firm shall provide the temporary laborer with the assignment notification statement (and obtain acknowledgement of receipt of the assignment notification statement if the temporary help service firm intends to do so) in person at the office of the temporary help service firm.

(d) When the temporary laborer is assigned to the same assignment for more than one day (a multi-day assignment), the temporary help service firm shall only be required to provide the assignment notification statement to the temporary laborer on the first day of the assignment and on any day that any of the terms listed on the assignment notification statement are changed.

(e) The assignment notification statement in (a) above shall contain the following:

1. The name of the temporary laborer;

2. The name, address and telephone number of the following:

i. The temporary help service firm, or the firm's agent facilitating the placement;

ii. The temporary help service firm's workers' compensation carrier;

iii. The worksite employer or third-party client; and

iv. The Department of Labor and Workforce Development;

3. The name and nature of the work to be performed by the temporary laborer;

4. The wages offered to the temporary laborer;

5. The name and address of the assigned worksite of the temporary laborer;

6. The terms of transportation offered to the temporary laborer, if applicable;

7. A description of the position offered to the temporary laborer;

8. Whether the position offered to the temporary laborer will require any special clothing;

i. If the position offered to the temporary laborer will require any special clothing, a description of the special clothing required;

ii. If the position offered to the temporary laborer will require any special clothing, whether it will be provided by the temporary help service firm at no cost to the temporary laborer; by the third-party client at no cost to the temporary laborer; or by the temporary laborer, and if by the temporary laborer, at what approximate cost to the temporary laborer;

9. Whether the position offered to the temporary laborer will require any protective equipment ;

i. If the position offered to the temporary laborer will require any protective equipment, a description of the protective equipment required;

ii. If the position offered to the temporary laborer will require any protective equipment, whether it will be provided by the temporary help

service firm at no cost to the temporary laborer; by the third-party client at no cost to the laborer; or by the temporary laborer, and if by the temporary laborer, at what approximate cost to the temporary laborer;

10. Whether the position offered to the temporary laborer will require any training;

i. If the position offered to the temporary laborer will require any training, a description of the training required;

ii. If the position offered to the temporary laborer will require any training, whether it will be provided by the temporary help service firm at no cost to the temporary laborer; by the third-party client at no cost to the laborer; or by the temporary laborer, and if by the temporary laborer, at what approximate cost to the temporary laborer;

11. Whether the position offered to the temporary laborer will require any supplies;

i. If the position offered to the temporary laborer will require any supplies, a description of the supplies required;

ii. If the position offered to the temporary laborer will require any supplies, whether they will be provided by the temporary help service firm at no cost to the temporary laborer; by the third-party client at no cost to the laborer; or by the temporary laborer, and if by the temporary laborer, at what approximate cost to the temporary laborer;

12. Whether any meal(s) will be provided to the temporary laborer by the temporary help service firm or the third-party client; and, if yes, list the cost to the temporary laborer, if any;

13. Whether equipment (other than protective equipment) will be provided to the temporary laborer by the temporary help service firm or the third-party client; and, if yes, list the cost to the temporary laborer, if any;

14. Whether the position offered to the temporary laborer will require any license(s);

i. If the position offered to the temporary laborer does require any license(s), a description of the license(s) required;

ii. For the purpose of this paragraph, the term "license" shall include any license or certification needed to perform any occupation or occupational activity;

15. Terms of the transportation offered to the temporary laborer, if applicable;

16. For muti-day assignments, the schedule;

17. The length of the assignment, if known; and

18. The amount of sick leave to which temporary laborers are entitled under the New Jersey Earned Sick Leave Law, N.J.S.A. 34:11D-1 et seq., and the terms of its use.

12:72-3.2 Notice of change on multi-day assignment

(a) For a multi-day assignment, when there is a change in the schedule, shift or location, the temporary help service firm shall, when possible, provide notice 48 hours in advance of the change to the temporary laborer in a manner appropriate to whether the assignment was accepted at the temporary help service firm's office, or remotely by telephone, text, email or other electronic exchange.

1. Where the assignment is accepted remotely by text, email or other electronic exchange, the temporary help service firm shall provide the temporary laborer with notice of the change in schedule, shift or location (and obtain acknowledgment of receipt of the notice of change if the temporary help service firm intends to do so) by text, email or other electronic exchange, and may not require the temporary laborer to travel to the office of the temporary help service firm solely to receive notice of the change or acknowledge receipt of the notice of change.

2. Where the assignment is accepted by telephone or in person at the office of the temporary help service firm, the temporary help service firm shall at the time of dispatch provide the temporary laborer the option of receiving notices of change in schedule, shift or location (and acknowledging receipt of notices of change if the temporary help service firm intends to do so) either (i) by telephone, (ii) by text, email or other electronic exchange, or (iii) by traveling to the office of the temporary help service firm.

(b) The temporary help service firm shall bear the burden of showing that it was not possible to provide the required notice.

(c) In the event that the Commissioner imposes an administrative penalty against a temporary help service firm under N.J.A.C. 12:72-1.2 for failure to provide the notice of change required under this section and the temporary help service firm requests a hearing under N.J.A.C. 12:72-1.3 to challenge the administrative penalty, any dispute concerning whether it was possible for the temporary help service firm to provide the notice of change required under this section shall be adjudicated during that hearing.

12:72-3.3 Notice of labor dispute

(a) No temporary help service firm shall send any temporary laborer to any designated classification placement where a strike, lockout, or other labor dispute exists without providing, at the time of dispatch, a statement, in writing, informing the temporary laborer of the labor dispute, and the temporary laborer's right to refuse the assignment.

(b) The requirement in (a) above shall apply only where the strike, lockout or other labor dispute is occurring at the factory, establishment or other premises to which the temporary laborer is being assigned by the temporary help service firm.

12:72-3.4 Confirmation of having sought work

(a) On any day that a temporary laborer who is employed by the temporary help service firm is not placed with a third-party client or otherwise contracted to work, the temporary help service firm shall provide to the temporary laborer, upon the temporary laborer's request, written confirmation that the temporary laborer sought work on that day.

(b) The written confirmation provided under (a) above shall be signed by an employee of the temporary help service firm, shall indicate the date and time that the written confirmation was received by the temporary laborer, and shall include the name of the temporary help service firm, and the name and address of the temporary laborer.

12:72-3.5 Translation of notices into languages other than English

(a) It shall be the responsibility of the temporary help service firm to make the assignment notification statement required under N.J.A.C. 12:72-3.1, the notices required under N.J.A.C. 12:72-3.2 and 12:72-3.3, and the written confirmation required under N.J.A.C. 12:72-3.4, available to temporary laborers in Spanish or in any other language that is generally understood in the locale of the temporary help service firm.

1. For the purpose of this section, the phrase, "any other language that is generally understood in the locale of the temporary help service firm" means the language identified by the employee as the employee's primary language.

(b) The temporary help service firm may meet the requirement under (a) above either through its own employees or through the services of a vendor.

(c) Whether the Department makes the assignment notification statement required under N.J.A.C. 12:72-3.1, either of the notices required under N.J.A.C. 12:72-3.2 and 12:72-3.3, or the written confirmation required under N.J.A.C. 12:72-3.4, available to temporary help service firms in Spanish and/or other languages, this does not relieve the temporary help service firm of its responsibility under (a) above (and under N.J.S.A. 34:8D-2(c)) to make the notices available to temporary laborers in

Spanish and in any other language that is generally understood in the locale of the temporary help service firm.

SUBCHAPTER 4 RECORDKEEPING

12:72-4.1 Recordkeeping obligations; temporary help service firm

(a) A temporary help service firm shall keep the following records with regard to each assignment of a temporary laborer to work in a designated classification placement:

1. The name and address of the temporary laborer;

2. The name, address, and telephone number of the third-party client,

3. The date on which the temporary help service firm contracted with the third-party client for the services of the temporary laborer;

4. The name, address and telephone number of each worksite to which the temporary laborer was sent by the temporary help service firm, and the date that the temporary laborer was sent to each worksite;

5. The name and nature of the work that was performed by the temporary laborer;

6. The number of hours that were worked by the temporary laborer;

7. The number hours billed by the temporary help service firm to the third-party client for the temporary laborer's hours of work;

8. The temporary laborer's hourly rate of pay;

9. The name and title of the individual(s) at the third-party client who are responsible for the temporary laborer's assignment;

10. Any specific qualifications or attributes of a temporary laborer that were requested by the third-party client for the assignment;

11. Copies of the contract(s) with the third-party client for the assignment;

12. Copies of any invoice(s) provided by the temporary help service firm to the third-party client for payment in relation to the assignment;

13. Copies of the statements, notices, and written confirmations, provided by the temporary help service firm to the temporary laborer under N.J.A.C. 12:72-3.1 through 3.4 above;

14. A record of any deductions made from the temporary laborer's wages, including a description of each deduction and the amount of each deduction; and

15. Verification of the actual cost to the temporary help service firm or third-party client of any equipment or meal charged to the temporary laborer.

(b) The temporary help service firm shall obtain, and keep on file, documentation that any provider of transportation to a temporary laborer that the temporary help service firm makes referrals to or contracts with is in compliance with the requirements of N.J.S.A. 34:8D-5(e), (f) and (g).

(c) Each record listed in (a) and (b) above shall be maintained by the temporary help service firm for a period of six years from the date of the record's creation.

12:72-4.2 Recordkeeping and record remitting obligations; third-party client

(a) A third-party client shall keep the following records with regard to each temporary laborer assigned by a temporary help service firm to work in a designated classification placement for the third-party client:

1. The name, address and telephone number of each worksite to which the temporary laborer was sent by the temporary help service firm, and the date that the temporary laborer was sent to each worksite;

2. The name and nature of the work that was performed by the temporary laborer;

3. The number of hours that were worked by the temporary laborer;

4. The temporary laborer's hourly rate of pay;

(b) For each work week in which the temporary laborer performed work with the third-party client, the third-party client shall remit the records listed in (a) above to the temporary help service firm no later than seven business days after the last day of the work week.

1. For the purpose of this subsection, unless expressly set forth otherwise in an agreement between the temporary help service firm and the third-party client, the last day of each work week is the Sunday of that calendar week.

12:72-4.3 Inspection

(a) All records maintained by the temporary help service firm under N.J.A.C. 12:72-4.1 shall be open to inspection by the Commissioner during normal business hours.

(b) All records listed in N.J.A.C. 12:72-4.1(a), with the exception of the records listed in N.J.A.C. 12:72-4.1(a)10., 11. and 12., shall be made available by the temporary help service firm during normal business hours for copying by the temporary laborer or by an authorized representative of the temporary laborer at no cost to the temporary laborer or to the temporary laborer's authorized representative.

1. As a condition to obtaining access to and/or copying records under this subsection, the temporary laborer or the authorized representative of the temporary laborer may be required to submit a written request to the temporary help service firm.

2. Upon receipt of the written request for access and/or copying under 1. above, the temporary help service firm shall provide the temporary laborer or the authorized representative of the temporary laborer access to and the facilities to copy the requested records within five business days.

3. As a condition to an authorized representative of the temporary laborer obtaining access to and/or copying records under this subsection, the authorized representative must submit with the request a written authorization, signed by the temporary laborer, that expressly permits the authorized representative to review and copy the subject records.

4. The temporary help service firm shall make available to temporary laborers and their authorized representatives at the office of the temporary help service firm forms for use by temporary laborers and their authorized representatives in submitting requests to access and/or copy records under (b) above.

(c) The temporary help service firm shall not make any false, inaccurate, or incomplete entry into, or delete, any required information from any record required to be kept by the temporary help service firm under N.J.A.C. 12:72-4.1.

SUBCHAPTER 5 TRANSPORTATION

12:72-5.1 Requiring use prohibited

(a) A temporary help service firm shall not require a temporary laborer to use transportation provided by the temporary help service firm or by another provider of transportation services.

12:72-5.2 Charging a fee prohibited

(a) A temporary help service firm or a third-party client, or a contractor or agent of either, shall not charge a fee to a temporary laborer to transport the temporary laborer to or from the worksite.

12:72-5.3 Referrals

(a) A temporary help service firm shall not refer a temporary laborer to any person for transportation to or from a worksite, unless that person is either:

1. A public mass transportation system; or

2. Providing the transportation at no fee to the temporary laborer;

(b) For the purpose of this section, the following shall be considered a referral by the temporary help service firm:

1. Directing a temporary laborer to accept a specific carpool as a condition of work; or

2. Any mention or discussion of the cost of a carpool;

(c) For the purpose of this section, the following shall not be considered a referral by the temporary help service firm:

1. Informing a temporary laborer of the availability of a carpool driven by another temporary laborer.

12:72-5.4 Motor vehicle safety

(a) If a temporary help service firm provides transportation to a temporary laborer or refers a temporary laborer to any person for transportation to a worksite, the temporary help service firm shall not allow a motor vehicle to be used for the transporting of the temporary laborer if the temporary help service firm knows or should know that the motor vehicle used for the transportation of the temporary laborer is unsafe, or if any of the following circumstances exist:

1. The motor vehicle is not insured in accord with the minimum insurance requirements set by the State of New Jersey;

2. The driver of the motor vehicle does not hold a valid license to operate motor vehicles in the correct classification; or

3. The motor vehicle does not have a seat and safety belt for each passenger.

(b) If the Department becomes aware of any of the circumstances set forth in (a)1. through (a)3. above, with regard to a motor vehicle that is owned or operated by a

temporary help service firm that makes designated classification placements or a third-party client of such a firm, or a contractor or agent of either, or a person to which a temporary help service firm refers a temporary laborer, which is used for the transportation of temporary laborers, it shall, in addition to or as an alternative to the assessment of a penalty against the temporary help service firm under N.J.A.C. 12:72-1.3(d), refer the matter to the appropriate law enforcement authority or regulatory agency.

12:72-5.5 Transportation back to point of hire

(a) Unless the temporary laborer requests otherwise, when a temporary laborer has been transported to a worksite, the temporary help service firm or a third-party client, or a contractor or agent of either, shall provide transportation back to the point of hire at the end of each work day.

1. For the purpose of this section, the term "point of hire" shall mean the location from which the temporary laborer was dispatched to perform work for the third-party client.

SUBCHAPTER 6 POST EMPLOYMENT RESTRICTIONS

12:72-6.1 Post employment restriction prohibited

(a) A temporary help service firm shall be prohibited from placing any restriction on a temporary laborer from either, accepting a permanent position with a third-party

client to which the temporary help service firm has assigned the temporary laborer to perform work, or accepting any other permanent employment.

(b) A temporary help service firm shall be prohibited from placing any restriction on a third-party client from offering employment to a temporary laborer, except that the temporary help service firm may charge the third-party client a placement fee as set forth in N.J.A.C. 12:72-6.2.

12:72-6.2 Placement fee

(a) A temporary help service firm may charge a placement fee to a third-party client when the third-party client employs a temporary laborer who had been assigned by the temporary help service firm to perform work for the third-party client.

(b) The placement fee in (a) above shall not exceed the equivalent of the total daily commission rate that the temporary help service firm would have received over a 60-day period, reduced by the equivalent of the daily commission rate that the temporary help service firm would have received for each day the temporary laborer would have performed work for the temporary help service firm in the preceding 12 months.

(c) The following method shall be used to determine the maximum placement fee that may be charged by a temporary help service firm to a third-party client relative to the services of a given temporary laborer:

1. First, calculate the daily commission rate by subtracting the daily wages paid by the temporary help service firm to the temporary laborer for work performed on assignment to the third-party client and the daily cost to the

temporary help service firm of benefits provided to the temporary laborer during the period of the temporary laborer's assignment with the third-party client, from the total daily amount paid by the third-party client to the temporary help service firm for the services of the temporary laborer;

2. Second, multiply the amount arrived at in (c)1. above by 43 (8.6 work weeks, multiplied by 5 workdays per week, for a total of 43 workdays), to arrive at the "equivalent of the total daily commission rate that the temporary help service firm would have received over a 60-day period;"

3. Third, multiply the amount arrived at in (c)1. above by the number of days that the temporary laborer performed work for third-party clients of the temporary help service firm during the 12-month period immediately preceding the date upon which the temporary laborer accepted an offer of employment by the third-party client; and

4. Fourth, subtract the amount arrived at in (c)3. above from the amount arrived at in (c)2. above.

5. If the amount arrived at in (c)4. above is a positive number, then that is the maximum placement fee that may be charged by the temporary help service firm to the third-party client. If the amount arrived at in (c)4. above is either zero or a negative number, then the maximum placement fee that may be charged by the temporary help service firm to the third-party client is zero.

(d) A temporary help service firm shall be prohibited from collecting a placement fee during any period of suspension, revocation or non-renewal of its certification to

make designated classification placements by the Director of the Division of Consumer Affairs.

SUBCHAPTER 7 PAY EQUITY

12:72-7.1 Temporary laborer pay equity requirement

(a) Any temporary laborer assigned to work at a third party client in a designated classification placement shall not be paid less than the average rate of pay and average cost of benefits, or the cash equivalent thereof, of employees of the third party client performing the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions for the third party client at the time the temporary laborer is assigned to work at the third party client.

12:72-7.2 Calculation of the hourly rate of pay that the temporary help service firm must pay the temporary laborer based on the average rate of pay and average cost of benefits of comparator employees of the third-party client

(a) At the time that the temporary help service firm contracts with the third-party client for the services of the temporary laborer, the third-party client shall provide to the temporary help service firm a listing of the hourly rate of pay and cost per hour of benefits for each employee of the third-party client who the third-party client determines would be a comparator employee.

(b) The temporary help service firm shall base its calculation of the average rate of pay and average cost of benefits for comparator employees of the third-party client,

for the purpose of determining the temporary laborer's hourly rate of pay, on the information that it receives from the third-party client under (a) above.

(c) Where the third-party client pays a comparator employee on a salary basis, the hourly rate of pay for the comparator employee shall be calculated by dividing the annual salary paid to the comparator employee by 2,080 hours.

(d) To calculate the cost per hour of benefits, the annual cost to the employer of benefits shall be divided by 2,080 hours.

(e) In order for the temporary help service firm to determine under this section the appropriate hourly rate of pay for the temporary laborer on a designated classification placement, the temporary help service firm shall use the following method:

1. Take the sum of the hourly rates of pay of the comparator employees identified by the third-party client and divide it by the number of comparator employees to arrive at the average hourly rate of pay of the third-party client's comparator employees;

2. Take the sum of the cost per hour of benefits of the comparator employees identified by the third-party client and divide it by the number of comparator employees to arrive at the average cost per hour of benefits of the third-party client's comparator employees;

3. Subtract the cost per hour of benefits provided by the temporary help service firm to the temporary laborer, from the sum of the average hourly rate of pay of the third-party client's comparator employees and the average cost per hour of benefits of the third-party client's comparator employees;

4. The amount in 3. above is the hourly rate of pay that the temporary help service firm shall pay the temporary laborer for all work performed on the designated classification placement.

12:72-7.3 Determining whether a temporary laborer and third-party client employee are performing substantially similar work

(a) The following principles should be applied when determining whether a temporary laborer and an employee of the third-party client are performing substantially similar work:

1. Substantially similar work should be viewed as a composite of skill, effort and responsibility performed under similar working conditions;

2. Functions and duties need not be identical in order to be substantially similar;

3. Occasional, trivial or minor differences in duties that only consume a minimal amount of the employee's time will not render the work dissimilar;

4. Job titles and job descriptions are relevant, but not dispositive of whether two individuals are performing substantially similar work;

5. The determination should focus on an analysis of the actual job duties performed, not the specific person performing the work;

6. The analysis should be applied to a full work cycle, not just a snap shot of a particular time period or day.

7. Skill is measured by factors such as the experience, ability, education and training required to perform a job.

8. Effort is the amount of physical or mental exertion needed to perform a job.

9. Responsibility is the degree of accountability and discretion required to perform a job.

10. The number of years of service (i.e., seniority) of a particular employee is not relevant to the determination of whether two jobs are substantially similar, even where the third-party client's employee compensation system is seniority based; but rather, what is relevant is the number of years of experience that are required to perform a job.

i. For example, if the job to which the temporary laborer is being assigned with the third-party client requires five years of relevant experience and the job being performed by the prospective comparator employee of the third-party client requires five years of the same experience, this would be a factor mitigating in favor of a finding that the two jobs are substantially similar, notwithstanding that the comparator employee of the third-party client has worked for the third-party client for more than five years.

11. The third-party client's use of a merit system for the compensation of its employees is not relevant to the determination of whether two jobs are substantially similar.

12. Working conditions, for the purpose of determining whether two jobs are being performed under similar working conditions, means the physical surroundings and hazards, but does not include job shifts.

SUBCHAPTER 8 CHARGES; PAYROLL DEDUCTIONS

12:72-8.1 Unreturned reusable equipment

(a) A temporary help service firm may deduct from the wages of a temporary laborer the actual market value of unreturned reusable equipment that was provided to the temporary laborer by the temporary help service firm; provided that the temporary laborer authorizes the deduction in writing at the time the deduction is made.

12:72-8.2 Additional equipment, clothing, accessories, or other items which are not required by the nature of the work, that are made available for purchase

(a) When a temporary help service firm makes available for purchase by a temporary laborer any equipment, clothing, accessories, or other items that are not required by the nature of the work, either by law, custom or as a requirement of the third-party client, the temporary help service firm shall charge no more than the actual market value.

12:72-8.3 Meals

(a) A temporary help service firm shall not charge a temporary laborer for a meal not consumed by the temporary laborer and, if consumed, shall charge no more than the actual cost of the meal.

(b) A temporary help service firm shall not condition the employment of a temporary laborer on the purchase of a meal.

12:72-8.4 Consumer report, criminal background check, or drug test

(a) No temporary help service firm or third-party client shall charge a temporary laborer for the expense of conducting a consumer report, as that term is defined in the "Fair Credit Reporting Act," (15 U.S.C. 1681 et seq.), a criminal background check, or a drug test.

SUBCHAPTER 9 OTHER TEMPORARY HELP SERVICE FIRM RESPONSIBILITIES, THIRD-PARTY CLIENT RESPONSIBILITIES, AND TEMPORARY LABORER PROTECTIONS

12:72-9.1 Detailed itemized statement

(a) At the time the temporary help service firm pays the temporary laborer their wages, the temporary help service firm shall provide the temporary laborer with a detailed itemized statement, either on the temporary laborer's paycheck stub, or using the form made available at that time on the Department website at https://www.nj.gov/labor/wageandhour/, listing the following:

1. The name, address and telephone number of each third-party client at which the temporary laborer worked during that pay period;

i. If the information in this paragraph is provided on the temporary laborer's paycheck stub, the temporary help service firm may use a code for each third-party client, so long as the temporary help service firm also makes available to each temporary laborer at that time a key containing

the name, address and telephone number for each coded third-party client.

2.The number of hours worked by the temporary laborer at each third-party client on each day during that pay period;

i. If the temporary laborer is assigned to work at the same worksite of the same third-party client for multiple days in the same work week, the temporary help service firm may provide the temporary laborer with the total hours worked at the third-party client's worksite during the pay period (as opposed to a daily accounting), so long as the first and last day of that work are identified;

3. The rate of pay for each hour worked by the temporary laborer during that pay period, including any premium rate or bonus;

4. The total pay period earnings;

5. The total amount of each deduction made from the temporary laborer's wages made by the temporary help service firm, and the purpose for which each deduction was made, including for the temporary laborer's food, equipment, withheld income tax, withheld Social Security deductions, withheld contributions to the State unemployment compensation trust fund and the State disability benefits trust fund, and every other deduction;

6. The current maximum amount of a placement fee under N.J.A.C. 12:72-6.2(c), which the temporary help service firm may charge to the third-party client to directly hire the temporary laborer;

7. The total amount charged by the temporary help service firm to the third-party client for the services of the temporary laborer during that pay period; and

8. Total cost to the temporary help service firm of benefits provided to the temporary laborer during that pay period.

12:72-9.2 Work verification; third-party client

(a) For the temporary laborer who is assigned to work a single day (as opposed to a multi-day assignment), the third-party client shall, at the end of the work day, provide the temporary laborer with a work verification, using the form made available at that time on the Department website at https://www.nj.gov/labor/wageandhour/.

(b) The work verification provided to the temporary laborer under (a) above shall contain the following:

1. The date;

2. The name of the temporary laborer;

3. The name and address of the work location; and

4. The start time, end time, and total hours worked on that day.

12:72-9.3 Annual earnings summary

(a) Within a reasonable time after the preceding calendar year, but in no case later than February 1 of the current calendar year, a temporary help service firm shall provide a temporary laborer with an annual earnings summary for the preceding calendar year.

(b) At the time the temporary help service firm pays the temporary laborer their wages, the temporary help service firm shall individually provide the temporary laborer with notice of the availability of the annual earnings summary.

1. As an alternative to the individual notice in (b) above, the temporary help service firm may post notice of the availability of the annual earnings summary in a conspicuous place in the public reception area of the temporary help service firm.

12:72-9.4 Holding of daily wages in favor of bi-weekly payments

(a) At the request of a temporary laborer, a temporary help service firm shall hold the daily wages of the temporary laborer and provide the temporary laborer with bi-weekly payments.

(b) The bi-weekly payment in (a) above shall be made by the temporary help service firm in accordance with the Department's rule regarding time and mode of wage payments at N.J.A.C. 12:55-2.4.

(c) A temporary help service firm that makes daily wage payments shall provide written notification to all temporary laborers of the right to request bi-weekly payments, rather than daily payments.

(d) The notification in (c) above may be provided by the temporary help service firm by conspicuously posting the notice at the location where the daily wages are received by the temporary laborers.

12:72-9.5 Time and mode of wage payments; check cashing fees prohibited

(a) With regard to all payment of wages by a temporary help service firm to a temporary laborer, the temporary help service firm shall adhere to the requirements of N.J.A.C. 12:55-2.4 for employers regarding time and mode of wage payments, which includes but is not limited to, the following requirements:

1. When a wage payment occurs by check, it shall be a check drawn on a financial institution where suitable arrangements are made for the cashing of such checks by employees without difficulty and for the full amount for which they were drawn; and

2. When a fee is charged for the cashing of a payroll check at the banking institution on which the check is drawn, the employer shall bear the burden of the fee.

12:72-9.6 Wage rate

(a) For work performed by a temporary laborer in the position described on the assignment notification statement that is provided to the temporary laborer by the temporary help service firm at the time of dispatch under N.J.A.C. 12:72-3.1, the temporary help service firm shall pay the temporary laborer no less than the "wages offered" that are also indicated on the assignment notification statement.

12:72-9.7 Non-utilization; change in worksite

(a) When a temporary help service firm has contracted with a third-party client for a temporary laborer to perform work at a worksite of the third-party client and the temporary laborer is not utilized (that is, the temporary laborer does not work), the

temporary help service firm shall pay the temporary laborer a minimum of four hours of pay at the agreed upon rate of pay.

(b) When a temporary help service firm has contracted with a third-party client for a temporary laborer to perform work at a worksite of the third-party client, but then contracts with that third-party client or another third-party client for the temporary laborer to perform work at a different worksite during the same shift, the temporary help service firm shall, in addition to any amounts due for work performed by the temporary laborer at the new worksite, pay the temporary laborer a minimum of two hours of pay at the agreed upon rate of pay for the work that would have been performed at the original worksite.

SUBCHAPTER 10 THIRD-PARTY PAYMENTS TO TEMPORARY HELP SERVICE FIRM

12:72-10.1 Third-party client payments to temporary help service firm for wages and related payroll taxes

(a) A third-party client is required to reimburse a temporary help service firm wages and related payroll taxes for services performed for the third-party client by a temporary laborer, according to payment terms outlined on invoices, service agreements, or stated terms provided by the temporary help service firm.

12:72-10.2 Complaints to Commissioner

(a) A temporary help service firm may file a complaint with the Commissioner that a third-party client has violated N.J.A.C. 12:72-10.1.

(b) A complaint under (a) above, shall be filed with the Division either in writing or through any on-line complaint process made available by the Division.

(c) When a complaint under (a) above has been filed by a temporary help service firm, the Division shall review the payroll and accounting records of the temporary help service firm and the third-party client for the period in which the violation is alleged to have occurred to determine if wages and payroll taxes were paid to the temporary help service firm and that the temporary laborer has been paid the wages owed.

(d) At the conclusion of an investigation pursuant to subsection (c) of this section, the Division may issue a determination that a third-party client has failed to pay wages or payroll taxes to the temporary help service firm. A temporary help service may seek a remedy for the third-party client's failure to pay wages or payroll taxes to the temporary help service firm in a court of competent jurisdiction.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

NEW JERSEY STAFFING ALLIANCE, NEW JERSEY BUSINESS AND INDUSTRY ASSOCIATION and THE AMERICAN STAFFING ASSOCIATION, Plaintiffs, v. STATE OF NEW JERSEY, ROBERT ASARO-ANGELO, COMMISSIONER OF LABOR AND WORKFORCE DEVELOPMENT, CARI FAIS, ACTING DIRECTOR OF THE DIVISION OF CONSUMER AFFAIRS IN THE DEPARTMENT OF LAW AND PUBLIC SAFETY, Defendants.	Civil Action No. 1:23-cv-02494-CPO-MJS **NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

NOTICE is hereby given that Plaintiffs, New Jersey Staffing Alliance, New Jersey Business and Industry Association and American Staffing Association, hereby appeals to the United States Court of Appeals for the Third Circuit from an Order entered by the Honorable Christine P. O'Hearn, U.S.D.J., on July 26, 2023 denying Plaintiffs' application for injunctive relief.

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By: */s/ Steven B. Harz*
Steven B. Harz, Esq.

DATED: August 3, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NEW JERSEY STAFFING ALLIANCE, *et al.*,

Plaintiffs,

v.

CARI FAIS, *Acting Director of the New Jersey Division of Consumer Affairs in the Department of Law & Public Safety*, *et al.*,

Defendants.

No. 1:23-cv-02494

OPINION

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O'HEARN, District Judge.

INTRODUCTION

In February 2023, the State of New Jersey enacted novel and landmark legislation aimed at protecting a "particularly vulnerable" workforce from abusive labor practices: the Temporary Workers' Bill of Rights ("the Act"). N.J. STAT. ANN. § 34:8D-1, *et seq.* The Act imposes a variety of new requirements on both the companies who hire temporary workers and the staffing agencies who supply them. *See id.* These requirements include, among other things, certain information disclosures, mandates regarding compensation and benefits, and prohibitions of retaliation and wage diversion. *E.g.*, §§ 34:8D-3; 34:8D-7; 34:8D-10. New Jersey is the first State to enact such laws. Some portions of the law went into effect in May 2023; others take effect on August 5, 2023. *E.g.*, §§ 34:8D-10, 34:8D-7.

Now, Plaintiffs New Jersey Staffing Alliance ("NJSA"), New Jersey Business & Industry Association ("NJBIA"), and American Staffing Association ("ASA," and with NJSA and NJBIA, "Plaintiffs")—three industry groups whose members include those regulated by the Act—have brought this action challenging the Act's constitutionality, seeking a temporary restraining order and preliminary injunction (and, ultimately, a permanent injunction) precluding the Act's enforcement under the U.S. and New Jersey Constitutions and state and federal civil rights statutes. (ECF No. 1). The Court ordered Defendants Cari Fais, the Acting Director of the New Jersey Division of Consumer Affairs; Robert Asaro-Angelo, Commissioner of Labor & Workforce Development; the state agencies they lead; and the State of New Jersey (collectively, "Defendants") to show cause why such an injunction should not issue. (ECF No. 10). Defendants filed their opposition, to which Plaintiffs replied. (ECF Nos. 18–19). The Court heard oral argument pursuant to Local Rule 78.1 on June 13, 2023.

Having considered the parties' papers and oral arguments, for the reasons that follow, Plaintiffs' Motion is **DENIED**.

I. BACKGROUND

A. The Act

New Jersey Governor Phil Murphy signed the Temporary Workers' Bill of Rights into law on February 6, 2023. *See Bill A1474 Aa w/GR (2R)*, N.J. LEG. (2022), https://www.njleg.state.nj.us/bill-search/2022/A1474. This marked the end of a long legislative process, which began with the Act's introduction in the New Jersey Assembly in January 2022, involved considerable lobbying efforts against it, nearly ended with Governor Murphy's conditional veto[1] in September 2022 before the New Jersey Legislature's concurrence, and culminated in its passage and enactment in February. *Id.*; (Decl. of Michele Siekerka, ECF No. 1-4, ¶ 8; Hr'g Tr., ECF No. 24 at 12:11–15).

The Act aims to "further protect the labor and employment rights of [temporary] workers," who number "at least 127,000 . . . in New Jersey" and who the Legislature found "are particularly vulnerable to abuse of their labor rights, including unpaid wages, failure to pay for all hours worked, minimum wage and overtime violations, unsafe working conditions, unlawful deductions from pay for meals, transportation, equipment, and other items, as well as discriminatory practices." §§ 34:8D-1(a), (c)–(d). The Legislature also acknowledged that "full-time temporary

[1] An earlier version of the Act applied its terms to *all* temporary workers in New Jersey, but Governor Murphy conditionally vetoed that version in September 2022, recommending—among other things—that the Legislature tailor the bill to "those positions in the workforce at greatest risk of exploitation" in order to "ease the compliance burdens placed on the temporary help service industry, while ensuring that laborers in certain occupations subject to more extreme hardships receive due protection and consideration in enforcement." Conditional Veto Statement, A.1474 (First Reprint), N.J. LEG. 3 (Sept. 22, 2022), https://pub.njleg.state.nj.us/Bills/2022/A1500/1474_V1.PDF.

help service firm workers earn 41 percent less than workers in traditional work arrangements, and these workers are far less likely than other workers to receive employer-sponsored retirement and health benefits," and that "[r]ecent national data indicate that the share of Black and Latino temporary and staffing workers far outstrips their proportion of the workforce in general." § 34:8D-1(b).

In response to these problems, the Act provides temporary workers[2] a number of new protections, including the following:

- **Disclosure:** Temporary staffing agencies now must provide laborers covered by the Act with certain information about each job placement, including the nature of the work to be performed; the wages offered; whether any special clothing, equipment, or training is required or provided; and the schedule for and duration of the assignment. § 34:8D-3(a). Staffing agencies must also provide 48-hour notice of a change "in the schedule, shift, or location of an assignment . . . when possible." *Id.* Agencies further must inform workers of any "strike, lockout, or other labor dispute . . . and [of] the laborer's right to refuse [such] assignment." § 34:8D-3(b).

- **Recordkeeping:** Temporary staffing agencies must keep and maintain records related to all placement transactions, including "(1) information related to the third-party client and each worksite and the date of the transaction; (2) the name, address and specific location sent to work, the type of work performed, the number of hours worked, the hourly rate of pay and the date sent. . . . ; (3) the name and address of the individual at each third-party client's place of business responsible for the transaction; (4) any special qualifications or attributes requested by each third-party client; (5) copies of contracts with the third-party client; (6) copies of notices required by subsection 3(a); and (7) details regarding deductions." (Plas.' Br., ECF No. 1-2 at 6–7 (summarizing § 34:8D-4(a))). Agencies must keep these records for at least six years, and failure to do so, or failure by a third-party client to remit accurate information, could result in a civil monetary penalty. §§ 34:8D-4(b)–(c).

[2] Upon implementing the changes recommended by Governor Murphy's conditional veto, the protections have only been extended to a subset of the workers in the temporary staffing industry, namely those involved in the following sectors: (1) protective services, such as animal control, private investigation, and security; (2) food preparation, such as cooking, bartending, dishwashing, and serving; (3) building and grounds cleaning and maintenance, including pest control and landscaping; (4) personal care and services, such as hairdressers, attendants, bellhops, and childcare; (5) construction and related fields, such as carpentry, painting, electrical, and roofing; (6) installation, maintenance, and repair; (7) production, including manufacturing, fabricating, food processing, chemical processing, and plant operation; and (8) transportation and logistics. *See* N.J. STAT. ANN. § 34:8D-2.

- **Transportation:** Among other requirements, temporary staffing agencies and third-party clients are barred from charging temporary workers fees for transportation to and from a worksite, must provide transportation back to the point of hire if the worker has been transported to a worksite, and vehicles used to transport workers must be properly insured, be driven by properly-licensed drivers, and must have a seat and seat belt for every passenger. § 34:8D-5.

- **Pay Statements:** Among other requirements, temporary staffing agencies must "provide a temporary laborer certain information at the time of payment of wages. The same Section requires that the third-party client, at the end of the work day, provide the temporary laborer a verification form with required information, including the . . . worker's name, work location, and hours worked. Failure to comply carries a civil penalty for each violation." (Plas.' Br., ECF No. 1-2 at 7 (summarizing § 34:8D-6)). In addition, staffing agencies are prohibited from withholding or diverting wages except as authorized by the statute, and third-party clients are required to reimburse the agency for firm the wages and related payroll taxes by a temporary laborer in accordance with payment hours outlined in invoices, service agreements or stated terms. §§ 34:8D-6(b), (h).

- **Pay:** Temporary workers may not "be paid less than the average rate of pay and average cost of benefits, or the cash equivalent thereof, of employees of the third-party client performing the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions for the third-party client at the time the temporary laborer is assigned to work at the third-party client." § 34:8D-7(b). The Act also restricts the amount a temporary staffing agency may charge a third-party client that permanently hires a temporary worker as a placement fee and imposes a $5,000 penalty for each violation of the Section. §§ 34:8D-7(a), (c); Third-party clients may also be held jointly and severally liable for such violations. § 34:8D-7(d).

- **Anti-Retaliation:** Temporary staffing agencies and their third-party clients or their agents are prohibited from taking retaliatory employment action against a covered worker who exercises his or her rights under the Act. *See* § 34:8D-10.

- **Private Cause of Action:** Aggrieved workers and temporary staffing agencies aggrieved by third-party clients may bring actions under the Act in New Jersey courts, and can seek relief including damages, attorney's costs and fees and, "in the case of unlawful retaliation, the greater of all legal or equitable relief as may be appropriate or liquidated damages equal to $20,000 per incident of retaliation." § 34:8D-11.

Defendants New Jersey Division of Consumer Affairs and Department of Labor & Workforce Development have both been tasked with the implementation and enforcement of different

provisions of the Act. *E.g.*, §§ 34:8D-5(d), 34:8D-8. Both agencies have posted guidance documents regarding the Act's enforcement on their websites, (Decl. of Robert Asaro-Angelo, ECF No. 18-1 at ¶¶ 3–4; Decl. of Cari Fais, ECF No. 18-2 at ¶¶ 3–4), and they recently published a Notice of Proposal regarding proposed regulations to clarify and implement the Act. Temporary Laborers (proposed July 21, 2023) (to be codified at N.J. ADMIN. CODE § 12:72-1.1, *et seq.*), https://www.nj.gov/labor/research-info/legalnotices.shtml. The Act's disclosure and anti-retaliation provisions became effective on May 7, 2023. §§ 34:8D-3; 34:8D-10. The balance of the Act will become effective on August 5, 2023. § 34:8D-1, *et seq.*

B. Effects on the Industry

Plaintiffs contend that upon the remainder of the Act—and particularly the pay provision, § 34:8D-7—becoming effective, the temporary staffing industry in New Jersey will be brought "to a halt." (Plas.' Br., ECF No. 1-2 at 11). To support this contention, the have submitted several sworn declarations from representatives of their members describing the alleged calamity to come. (ECF Nos. 19-1–19-5; ECF Nos. 23-1–23-6).

In general, these business leaders explain that they "are hearing [their] customers frequently voicing concerns regarding the lack of clarity within the [Act] as it pertains to pay provisions, equal benefits, etc. as well as the risk of joint and several liability." (ECF No. 23-3, ¶ 3; ECF No. 19-5, ¶ 2; ECF No. 23-4, ¶ 2; ECF No. 23-5, ¶ 6). Because of these concerns, many have seen clients cancel the staffing agencies' services, communicate their intent to "phase out" the agencies' services, or simply hire temporary workers to nominally permanent positions but with the intent to terminate them as soon as they are no longer needed. (ECF No. 23-3, ¶ 3). Others are leaving the State of New Jersey entirely. (ECF No. 19-1, ¶ 3; ECF No. 19-2, ¶ 3; ECF No. 19-5, ¶ 3; ECF No. 23-3, ¶ 3; ECF No. 23-4, ¶¶ 3–6).

Staffing agencies have expressed their own concerns with respect to the Act's information disclosure provisions and claim that they will lead to the disclosure of "various trade secrets." (ECF No. 23-3, ¶ 4; ECF No. 19-2, ¶ 2). The agencies report they have lost or anticipate losing hundreds of thousands to millions in annual revenue due their clients' response to the Act. (ECF Nos. 23-1–23-6). Several expect these losses will force them to cease operations. (ECF No. 19-5, ¶ 3; ECF No. 23-2, ¶ 5; ECF No. 23-5, ¶¶ 4–5; ECF No. 23-6, ¶ 3).

In light of the foregoing, Plaintiffs filed suit. (Compl., ECF No. 1).

II. PROCEDURAL HISTORY

Plaintiffs initiated this action on May 5, 2023, with the filing of their Complaint and Application for an Order to Show Cause for a Temporary Restraining Order and Preliminary Injunction, asserting claims under 42 U.S.C. § 1983 and the New Jersey Civil Rights Act, N.J. STAT. ANN. § 10:6-2, *et seq.*, for violations of certain federal and state constitutional rights. (ECF No. 1). Specifically, Plaintiffs' Complaint comprises seven counts: (i) violation of the "dormant" Commerce Clause, U.S. CONST., art. I, § 8, cl. 3; (ii) violation of due process through statutory vagueness under the U.S. and New Jersey Constitutions, U.S. CONST., amend. XIV, § 1; N.J. CONST., art. I, ¶ 1; (iii) violation of due process through the unreasonable exercise of the police power under the U.S. and New Jersey Constitutions, U.S. CONST., amend. XIV, § 1; N.J. CONST., art. I, ¶ 1; (iv) violation of the right to equal protection under the U.S. and New Jersey Constitutions, U.S. CONST., amend. XIV, § 1; N.J. CONST., art. I, ¶ 1; (v) violation of the Privileges and Immunities Clause, U.S. CONST., art. IV, § 2;[3] (vi) violation of § 1983; and (vii) violation of

[3] Count V of Plaintiff's Complaint purports to assert a claim under the "Privileges and Immunities Clause," but cites Section 2 of the Fourteenth Amendment—also known as the Privileges *or* Immunities Clause—as the source of the claim. (ECF No. 1, ¶¶ 91–93). The Privileges *and* Immunities Clause, meanwhile, can be found in Section 2 of Article IV of the Constitution. However, because the Fourteenth Amendment's Privileges *or* Immunities Clause has

the New Jersey Civil Rights Act.

The Court ordered Defendants to show cause why a temporary restraining order and preliminary injunction should not issue on May 8, 2023. (ECF No. 10). Defendants filed their opposition, (ECF No. 18), to which Plaintiffs replied, (ECF No. 19).

The Court heard oral argument pursuant to Local Rule 78.1 on June 13, 2023. (Hr'g Tr., ECF No. 24). At that hearing the Court granted leave for Plaintiffs to file supplemental briefing limited to the issue of irreparable harm, which Plaintiffs submitted on June 16, 2023. (ECF No. 23). Defendants responded on June 21, 2023. (ECF No. 26).

The Court later scheduled and held a status conference with the parties to explore settlement of this matter. (ECF Nos. 25, 27). Unfortunately, no settlement materialized, and the Court again ordered supplemental briefing limited to certain issues discussed at the conference. (ECF No. 28). Plaintiffs filed their second supplemental brief on July 3, 2023, (ECF No. 29), to which Defendants responded, (ECF No. 30), and Plaintiffs replied in further support, (ECF No. 31).

On July 21, 2023, Defendants notified the Court of the publication of a Notice of Proposal regarding newly-proposed regulations published by the New Jersey Department of Labor & Workforce Development, Division of Wage and Hour Compliance, to clarify and implement the Act. (ECF No. 32). Plaintiffs responded to this Letter on July 24, 2023. (ECF No. 33).

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been interpreted to protect only a very narrow set of rights since the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)—none of which appear relevant here, *see McDonald v. City of Chicago*, 561 U.S. 742, 754–57 (2010)—the Court presumes that Plaintiffs intend to rely on the "and" Clause in Article IV, and analyzes their claims accordingly.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 65 empowers courts to grant temporary and preliminary injunctive relief when warranted. FED. R. CIV. P. 65. "[I]njunctive relief is 'an extraordinary remedy' and 'should be granted only in limited circumstances.'" *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (quoting *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994)). To obtain a temporary restraining order or preliminary injunction under the Rule, a movant must show—

> (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted . . . . [In addition,] the district court, in considering whether to grant [temporary or preliminary relief], should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.

Reilly v. City of Harrisburg, 858 F.3d 173, 174 (3d Cir. 2017) (quoting *Del. River Port Auth. v. Transam. Trailer Transport, Inc.*, 501 F.2d 917, 919–20 (3d Cir. 1974)); *Zaslow v. Coleman*, 103 F. Supp. 3d 657, 662 (E.D. Pa. 2015) ("The standard for granting a temporary restraining order under Federal Rule of Civil Procedure 65 is the same as that for issuing a preliminary injunction."). Of these factors, the first two are "most critical," and a movant's failure to establish either at the "gateway" requires the denial of the requested relief. *Reilly*, 858 F.3d at 179 (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

IV. DISCUSSION

Plaintiffs seek emergency injunctive relief preventing Defendants from enforcing the provisions of the recently-enacted Temporary Workers' Bill of Rights, N.J. STAT. ANN. § 34:8D-1, *et seq*. (ECF No. 1) scheduled to take effect on August 5, 2023. Specifically, Plaintiffs assert claims under § 1983 and the New Jersey Civil Rights Act, arguing that various provisions of the Act violate the so-called "dormant" Commerce Clause, the Due Process and Equal Protection Clauses and their state constitutional analogues, and the Privileges & Immunities Clause. (ECF

No. 1-2). They contend that they are likely to succeed in litigating these claims and that their members[4] will be irreparably harmed if they are not granted emergency relief. (ECF No. 1-2). For the reasons that follow, the Court concludes that, although Plaintiffs have made the necessary showing with respect to irreparable harm, they have failed to show a likelihood of success on the merits of any of their claims, and their application for emergency injunctive relief must therefore be denied.

A. Plaintiffs Have Made the Necessary Showing with Respect to Irreparable Harm.

Plaintiffs argue that their members have been and will be further irreparably harmed if the Act is allowed to go into effect in its entirety because (i) "[a] constitutional violation is enough to establish irreparable harm"; and (ii) their members have sustained "substantial [economic] losses" caused by the Act that cannot be recovered as damages because of Defendants' immunity and that will be so significant as to threaten the existence of the members' businesses. (Plas.' Supp. Br., ECF No. 23). Although the Court is dubious of Plaintiffs' first argument, it agrees with the second and concludes that they have made the necessary irreparable harm showing.

First, the Court is not convinced that, even if Plaintiffs could show that Defendants' enforcement of the Act would result in constitutional injury—and, as discussed below, they cannot, *see infra* Section IV.B—that such an injury necessarily establishes irreparable harm to justify a grant of emergency injunctive relief. *Contra Atl. Coast Demolition & Recycling v. Bd. of Chosen Freeholders*, 893 F. Supp. 301, 309 (D.N.J. 1995) ("[A] violation of rights under the Dormant Commerce Clause constitutes the 'irreparable harm' necessary for a plaintiff to avoid denial of a

[4] After initially challenging Plaintiffs' standing to bring this suit, (Defs.' Br., ECF No. 18 at 13–18), Defendants later conceded at oral argument that Plaintiffs have associational standing to litigate this on behalf of their members, (ECF No. 24 at 14:7–13). Plaintiffs therefore assert that their members—various business involved in the temporary staffing industry and their partners—will be harmed by the Act in violation of their constitutional and statutory rights.

preliminary injunction on that ground only."). The Third Circuit has effectively said as much previously: "Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction." *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989). And subsequent cases, such as the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), cast further doubt on the premise that a purely legal injury is the type of harm that could support injunctive relief (or even Article III standing, for that matter). *Cf. id.* at 2214. But the Court need not settle this question conclusively because it accepts Plaintiffs' alternate arguments regarding Defendants' immunity and the threat to the existence of Plaintiffs' members businesses. (Plas.' Supp. Br., ECF No. 23 at 2–3).

Turning to those arguments, "[t]he irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be compensated after the fact by monetary damages." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484–85 (3d Cir. 2000). Crucially, for the risk of harm to be sufficiently significant, it must be "more likely than not [to occur] in the absence of preliminary relief." *Reilly*, 858 F.3d at 179.

Typically, "a purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement." *Minard Run Oil Co. v. U.S. Forest Service*, 670 F.3d 236, 255 (3d Cir. 2011) (quoting *Frank's GMC Truck Ctr., Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988)). However, "in instances where the injured parties cannot recover monetary damages after the fact, even purely economic harm is considered irreparable." *ITServe All., Inc. v. Scalia*, No. 20-14604, 2020 WL 7074391, at *9 (D.N.J. Dec. 3, 2020) (citing *California v. Azar*, 911 F.3d 558, 579–80 (9th Cir. 2018)). For example, when a movant "will suffer at least some harm that cannot be compensated through an award of money damages" because the party responsible for that harm is protected by certain immunities, the movant has satisfied the irreparable harm requirement for

injunctive relief. *See Cigar Ass'n of Am. v. City of Phila.*, 500 F. Supp. 3d 428, 436 (E.D. Pa. 2020) (citing *Temple Univ. v. White*, 941 F.2d 201, 214 (3d Cir. 1991)), *aff'd*, No. 20-03519, 2021 WL 5505406 (3d Cir. Nov. 24, 2021). Moreover, "an exception exists where the potential economic loss is so great as to threaten the existence of the movant's business." *Minard Run*, 670 F.3d at 255 (quoting *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st Cir. 2009)).

Here, in addition to injunctive relief, Plaintiffs seek damages under § 1983 and the New Jersey Civil Rights Act against all Defendants. (Compl., ECF No. 1). Indeed, Plaintiffs suggest that their members will experience "tremendous financial losses" if the Act is allowed to go into effect. (Plas.' Supp. Br., ECF No. 23 at 3). In support of this assertion, Plaintiffs have submitted declarations from business leaders among their membership that the Act could cause the leaders' temporary staffing businesses to lose hundreds of thousands to millions of dollars in revenue. (Supp. Decls., ECF Nos. 23-1–23-6). For example, one leader explains that many of her top clients have advised that they will cancel her staffing business's services because "they do not understand [the Act's] pay and benefits provisions, cannot make the calculations and refuse to place their companies at risk for joint and several liability." (Supp. Decl. of Polly McDonald, ECF No. 23-5, ¶ 4). She explains that losing these clients alone will cost her business nearly $10 million, or fifty-one percent of the business's gross revenue, and that the business "will not be able to continue operations with such a precipitous drop." (ECF No. 23-5, ¶¶ 4–5). Statements like these from this leader and others demonstrate the likelihood that at least some subset of Plaintiffs' members will be forced out of business if the Act goes into effect. (ECF No. 19-5, ¶ 3; ECF No. 23-2, ¶ 5; ECF No. 23-5, ¶¶ 4–5; ECF No. 23-6, ¶ 3).

Despite these significant alleged harms, the parties appear to agree that, at least as to Defendants State of New Jersey, New Jersey Division of Consumer Affairs and New Jersey

Department of Labor & Workforce Development, Plaintiffs would not be able to recover damages because those Defendants are immune under the Eleventh Amendment.[5] And although the sovereign immunity doctrine does not protect Defendants Cari Fais, Acting Director of the New Jersey Division of Consumer Affairs, or Robert Asaro-Angelo, Commissioner of Labor & Workforce Development, from liability for damages in their individual capacities, Defendants have already foreshadowed that they will raise a *qualified* immunity defense, (ECF No. 18 at 13 n.5), that the Court views as likely to succeed based upon the allegations of the Complaint. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 738 (2011). So, because Plaintiffs have shown that their members "will suffer at least some harm that cannot be compensated through an award of money damages" because of Defendants' likely Eleventh Amendment and qualified immunities, they have sufficiently demonstrated irreparable harm justifying injunctive relief.[6]

Even if a damages award were not foreclosed by these immunities, however, the Court would still find that Plaintiffs have sufficiently demonstrated the likelihood of their members suffering irreparable harm under *Minard Run*. 670 F.3d at 255. In that case, the Third Circuit

[5] Plaintiffs' counsel explicitly conceded their claims as to the State at the Court's June 13 preliminary injunction hearing. (Hr'g Tr., ECF No. 24 at 10:17–22). And although counsel was not willing to do the same with respect to the agencies, (ECF No. 24 at 12:1–21), Plaintiffs' subsequent briefing acknowledged as much, arguing that "Because Defendants Have Immunity From Monetary Damages, Plaintiffs' Economic Losses Constitute Irreparable Harm." (ECF No. 23 at 2).

[6] The Court admits some skepticism as to the "the exact *magnitude* of damage" that Plaintiffs will suffer, but notes that this skepticism does discount Plaintiffs' showing of irreparable injury. *Cigar Ass'n*, 500 F. Supp. 3d at 437. This skepticism arises because the Court provided Plaintiffs specific instructions regarding the type of data it was interested in reviewing to best understand the extent of the damages their members anticipated suffering, (ECF No. 24 at 48–51, 99), but Plaintiffs failed to provide that data in their supplemental submissions, (ECF No. 23). All the same, the Court recognizes that the relevant question is not the magnitude, but the likelihood of these damages, and regardless of their precise extent, Plaintiffs' declarations establish that at least some will be unrecoverable. *Cigar Ass'n*, 500 F. Supp. 3d at 437. As such, the Court is satisfied that Plaintiffs have shown a likelihood of some irreparable harm justifying injunctive relief.

affirmed a district court's finding of irreparable harm after "credit[ing] the testimony of several business owners that the [regulation at issue] had dramatically affected their business and would probably cause them to shut down or go bankrupt if it continued." *Id.* Here, Plaintiffs have identified and supplied sworn declarations from several of their members who anticipate going out of business if the Act is allowed to go into effect: Gerald M. Cerza of United Temporary Services, Inc., (ECF No. 23-2, ¶ 5); Polly McDonald of TeleSearch Staffing Solutions, (ECF No. 23-5, ¶¶ 4–5); and Juan Carlos Diaz of ProStaff Workforce Solutions, (ECF No. 23-6, ¶ 3). These business leaders cite specific revenue projection figures and communications with top customers to attribute the loss of their businesses to the Act. (ECF No. 23-2, ¶ 5; ECF No. 23-5, ¶¶ 4–5; ECF No. 23-6, ¶ 3). And beyond these three, it is fair to extrapolate that other industry members will similarly have "to make difficult choices." (Decl. of Edward H. Damm, ECF No. 23-3, ¶ 3).[7] Because Plaintiffs have demonstrated through these declarations that several of its members' businesses are likely to be dramatically affected and even shut down because of the Act,[8] they have met the necessary showing of irreparable harm. *Minard Run*, 670 F.3d at 255.[9]

[7] To be clear, the Court does not simply *infer* that more of Plaintiffs' members might be forced out of business because of the Act; rather, it views Mr. Damm's declaration, (ECF No. 23-3), as affirmative evidence that other businesses among Plaintiffs' members who are similarly situated to those cited above are at substantial risk of going out of business, and thus experiencing irreparable harm. *See Adams v. Freedom Forge Corp.*, 204 F.3d 475, 485–86 (3d Cir. 2000).

[8] The fact that the likely economic losses at issue here are substantial enough to drive these companies out of business is what differentiates them from the ordinary compliance costs that are typically insufficient to constitute irreparable harm. *See A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527 (3d Cir. 1976) (explaining that compliance costs must amount to "peculiar" injury to constitute irreparable harm and suggesting that compliance costs "so great vis a vis the corporate budget that significant changes in a company's operations would be necessitated" would be sufficient).

[9] Defendants noted at oral argument that "because [*Minard Run*] involved drilling rights and the interests involved real property, it was of a special kind of peculiar and specific nature of harm that could not be addressed or remedied later." (ECF No. 24 at 61:3–6). To be sure, they are right: the real property rights at issue in *Minard Run* provided significant support to the Third Circuit's holding that the district court properly found irreparable harm. 670 F.3d at 256. However, although *significant*, that support was not factually or legally *necessary* to the court's conclusion. The

In sum, because Plaintiffs have adequately shown that their members are likely to face economic losses that could threaten the existence of the members' businesses[10] and because those losses are likely unrecoverable from Defendants because of their sovereign and qualified immunities, they have made the necessary showing of irreparable harm to justify temporary and preliminary injunctive relief.[11] Nevertheless, because they are not likely to succeed on the merits of their claims, their application must be denied.

B. Plaintiffs Have Not Shown a Likelihood of Success on the Merits.

Regardless of any harms the Act might cause Plaintiffs' members, Plaintiffs have failed to demonstrate that they are likely to succeed on the merits of any of their claims, and their request

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court's discussion of the real property interests at issue provided "[a]dditional[]" support to its finding of irreparable harm, which was independently and sufficiently grounded in its discussion of substantial economic loss. *Id.* at 255–56 ("[T]he moratorium *also* causes irreparable injury to mineral rights owners by depriving them of the unique oil and gas extraction opportunities afforded them by their mineral rights." (emphasis added)).

[10] The significance of this statement is not lost on the Court: it is likely that many New Jersey temporary staffing agencies will go out of business because of this Act. As the Court will explain, that does not render the Act unconstitutional. *See infra* Section IV.B. And, to be clear, the Court does not mean to second-guess the State's policy judgments; the State might have reasonably concluded that this was a necessary cost for protecting temporary workers on the whole. But given these costs, the Court would have expected more caution from the State. Defendants' unwillingness to consider even a brief non-enforcement agreement, particularly as it relates to the pay provision, during the notice-and-comment period for their recently proposed regulations—issued on the eve of the Act taking effect—so that all involved parties and stakeholders could fairly assess and plan for the Act's implementation is disappointing given the tremendous changes that are about to occur. Temporary Laborers (proposed July 21, 2023) (to be codified at N.J. ADMIN. CODE § 12:72-1.1, *et seq.*), https://www.nj.gov/labor/research-info/legalnotices.shtml.

[11] The Court must acknowledge an important caveat to this finding. As Defendants rightly argue, irreparable harm requires "a claim-specific analysis," *e.g.*, *Weisshaus v. Cuomo*, 512 F. Supp. 3d 379, 387 (E.D.N.Y. 2021), and Plaintiffs must demonstrate that the irreparable harm that their members will suffer actually flow from Defendants' alleged constitutional and statutory violations. (Defs.' Supp. Br., ECF No. 26 at 2–3). But as the Court will explain, Plaintiffs are not likely to be able to prove any such constitutional and statutory violations. *See infra* Section IV.B. So, although the Court finds that Plaintiffs have shown the likelihood of irreparable harm from the Act, because the Act is likely consistent with Constitution, that harm does not flow from any violation of Plaintiffs' constitutional rights and cannot on its own cannot support injunctive relief.

for injunctive relief must therefore be denied.

To begin, as discussed above, the parties appear to agree that Plaintiffs' claims against the State of New Jersey and its agencies—Defendants New Jersey Division of Consumer Affairs and New Jersey Department of Labor & Workforce Development—are barred by the doctrine of sovereign immunity. *See supra* Section IV.A. Moreover, as Defendants rightly argue, (ECF No. 18 at 12), *all* of Plaintiffs' state-law claims, regardless of the Defendant against whom they are asserted, are also barred by sovereign immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984) ("[A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment."). Thus, as the Court explained at oral argument, (ECF No. 24 at 12:10–21), Plaintiffs' only viable claims are those against Defendants Fais and Asaro-Angelo under § 1983, asserting violations of the U.S. Constitution.[12]

As to those claims, Plaintiffs argue that certain provisions of the Act violate (i) the "dormant" Commerce Clause; (ii) the Due Process Clause; (iii) the Equal Protection Clause; and (iv) the Privileges & Immunities Clause. For the reasons that follow, however, the Court concludes that Plaintiffs are unlikely to succeed on any of these constitutional claims, and thus, their application for injunctive relief must be denied.

1. The Dormant Commerce Clause

Plaintiffs' main argument against the Act's constitutionality—that it violates the so-called "dormant" Commerce Clause—is foreclosed by the Supreme Court's recent decision in *National Pork Producers Council v. Ross*, 598 U.S. __, 143 S. Ct. 1142 (2023), which offered a major

[12] Because § 1983 only imposes liability upon those who deprive persons of *federal* constitutional or statutory rights, Plaintiffs' allegations that the Act violates the New Jersey Constitution cannot support their § 1983 claims. *See, e.g.*, *Leshko v. Servis*, 423 F.3d 337, 339 (3d Cir. 2005).

update to its Dormant Commerce Clause jurisprudence and rendered Plaintiffs' primary theory no longer viable.

The Dormant Commerce Clause doctrine has developed gradually through cases dating back to the early nineteenth century, *id.* at 1152 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824)), and generally stands for the proposition that "the Commerce Clause not only vests Congress with the power to regulate interstate trade; the Clause also 'contain[s] a further, negative command,' one effectively forbidding the enforcement of 'certain state [economic regulations] even when Congress has failed to legislate on the subject,'" *id.* Although it has taken many forms over the past 200 years, the doctrine has always aimed to preserve a prohibition on the "enforcement of state laws driven by economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* (internal quotations and alterations omitted) (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337–38 (2008)). Rooting out this state-based discrimination has always been the goal.

Despite this goal, for many years, one avenue for Dormant Commerce Clause plaintiffs to plead a claim had been to argue that a challenged law's extraterritorial *effects* amounted to direct regulation of interstate commerce in violation of the Clause's exclusive grant of congressional authority. *See, e.g.*, *TitleMax of Del., Inc. v. Weissmann*, 24 F.4th 230, 237–38 (3d Cir. 2022). However, the *National Pork* Court has rendered the "extraterritoriality doctrine" a dead letter: extraterritorial effects alone are no longer sufficient to show a violation of the Commerce Clause. 143 S. Ct. at 1153–57; *id.* at 1167 (Roberts, C.J., concurring in part and dissenting in part) ("[O]ur precedent does not support a *per se* rule against state laws with 'extraterritorial' effects."). Instead, plaintiffs now must demonstrate that a law amounts to "purposeful discrimination against out-of-state businesses." *See id.* at 1158–59.

Plaintiffs filed their Complaint just a week prior to the *National Pork* decision. Nevertheless, Plaintiffs have not alleged either at argument or in their supplemental briefing—at least not coherently[13]—purposeful discrimination against out-of-state businesses, all but dooming their claims.

Perhaps seeing the writing on the wall, Plaintiffs instead shifted their arguments to rely more heavily on three cases that clearly survived the *National Pork* revolution: *Healy v. Beer Institute*, 491 U.S. 324 (1989), *Brown-Forman Distillers Corporation v. New York State Liquor Authority*, 476 U.S. 573 (1986), and *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511 (1935). (Plas.' Reply, ECF No. 19 at 8–9; Hr'g Tr., ECF No. 24 at 29:31–30:24). However, none of these cases can save their claims.

In *Healy*, the Court reviewed a Connecticut law that required out-of-state beer merchants to affirm that their Connecticut prices were no higher than those they charged in neighboring states. 491 U.S. at 328–330. In effect, Connecticut imposed a most-favored-nation clause on all out-of-state beer distributors—indeed, explicitly applying the law only to them—to ensure that they could not attempt to undercut Connecticut distributors' prices. *See National Pork*, 143 S. Ct. at 1154–55 (quoting *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 391–92 (1994)). The Court easily struck down the plainly protectionist statute.

[13] At oral argument, Plaintiffs' counsel attempted to argue—as best as the Court understands it—that out-of-state businesses are treated differently than New Jersey businesses under the Act because out-of-state businesses who hire New Jersey temporary workers are required to furnish certain information to the workers under the Act's disclosure provisions. (ECF No. 24 at 34:5–36:22). But of course, New Jersey businesses are required to do the same. *See* N.J. STAT. ANN. § 34:8D-6. Indeed, every single burden imposed by the Act upon out-of-state businesses is likewise imposed upon New Jersey businesses. The Act does not discriminate. Counsel's argument appears to be a retreading of the extraterritorial effects theory that the *National Pork* Court rejected. 143 S. Ct. at 1153–57. Plaintiffs' members from outside New Jersey might not like having to comply with the Act—which undoubtedly is burdensome—when hiring New Jersey workers, but those requirements do not offend the Commerce Clause.

Brown-Forman involved a similar New York law that required liquor distillers to affirm on a monthly basis that their in-state prices were no higher than their out-of-state prices. 476 U.S. at 576. Again, the law "sought to force out-of-state distillers to 'surrender' whatever cost advantages they enjoyed against their in-state rivals." *National Pork*, 143 S. Ct. at 1154 (quoting *Brown-Forman*, 476 U.S. at 580). The Court once again struck down the law as plainly protectionist. *Id.*

Finally, in *Baldwin*, the Court analyzed another New York law "that barred out-of-state dairy farmers from selling their milk in the State 'unless the price paid to' them matched the minimum price New York law guaranteed in-state producers." *National Pork*, 143 S. Ct. at 1154 (quoting *Baldwin*, 294 U.S. at 519). This, of course, was even more brazenly protectionist: it allowed New York milk producers to set the minimum price of milk at the expense of out-of-state producers, "erecting an economic barrier protecting a major local industry against competition from without the State." *Id.* (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951)). Again, the Court said no. *Baldwin*, 294 U.S. at 519.

The Act here is nothing like those Connecticut or New York laws. Plaintiffs argue that the law is aimed at forcing out-of-state businesses to pay New Jersey temporary workers more than their out-of-state counterparts. (ECF No. 24 at 29:21–30:24).[14] This argument fails for multiple reasons. To begin, unlike the laws at issue in *Healy* and *Baldwin*, the Act applies equally to New Jersey and out-of-state businesses, so out-of-state businesses are in no way disadvantaged as compared to their New Jersey competitors. § 34:8D-1, *et seq.* Furthermore, every burden imposed

[14] To be clear, to the extent Plaintiffs attempt to argue that the Act disadvantages out-of-state temporary *workers* for the benefit of their New Jersey counterparts, Plaintiffs lack standing to raise such an argument. Plaintiffs represent temporary staffing *agencies*, not temporary workers. Their associational standing does not extend so far. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 498–99 (2009).

upon out-of-state businesses is likewise imposed on New Jersey businesses. There is simply nothing discriminatory about the Act. In fact, out-of-state staffing agencies are in some sense *advantaged* over New Jersey businesses: a Pennsylvania staffing agency seeking to place temporary workers at a Philadelphia business, for example, needs only to abide by Pennsylvania law, whereas a New Jersey agency seeking to do the same must abide by the Act, meaning the Pennsylvania agency can likely offer lower labor costs and fewer regulatory requirements than their New Jersey competitor. *See id.* Such a law could hardly be described as protectionist.

Plaintiffs' final argument—that the Act should be struck down under the *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), balancing test—also fails. "*Pike* provides that nondiscriminatory state regulations are valid under the Commerce Clause 'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" *National Pork*, 143 S. Ct. at 1167 (Roberts, C.J., concurring in part and dissenting in part). In other words, in a case of a nondiscriminatory statute—which the Act undisputedly is, (Plas.' Reply, ECF No. 19 at 8)—a plaintiff can still state a Dormant Commerce Clause claim when the statute's nondiscriminatory "burdens clearly outweigh the benefits of a state or local practice." *Dep't of Revenue of Ky.*, 553 U.S. at 353. Plaintiffs cannot show as much here.

Notably, only a "a small number" of cases "have invalidated state laws . . . that appear to have been genuinely nondiscriminatory" in nature under *Pike*. *National Pork*, 143 S. Ct. at 1166 (Sotomayor, J., concurring in part). "Often, such cases have addressed state laws that impose burdens on the arteries of commerce, on trucks, trains, and the like[, and] claims that do not allege discrimination or a burden on an artery of commerce are further from *Pike*'s core." *Id.* (quotation omitted); *but see id.* at 1168 (Roberts, C.J., concurring in part and dissenting in part) ("As a majority of the Court agrees, *Pike* extends beyond laws either concerning discrimination or

governing interstate transportation."). Plaintiffs' claims fall far from that core.

Although the Act admittedly imposes some burdens on interstate commerce, Plaintiffs have not and cannot show that those burdens are substantial. The Act's most significant impacts fall on New Jersey staffing agencies, who must comply with Act regardless of where they do business. § 34:8D-1, *et seq.* That said, the Act will undoubtedly reach out-of-state businesses seeking to hire New Jersey temporary workers. *Id.* But Plaintiffs have not shown the extent of these effects. And even if they did, the Supreme Court has held that regulations that impose wholesale change on market's structure do not impermissibly burden commerce. *See Exxon Corp. v. Gov. of Md.*, 437 U.S. 117, 127 (1978). Regardless, Plaintiffs have not shown how any of these burdens on interstate commerce could outweigh the State's admittedly legitimate interest in protecting workers. *See, e.g.*, *Businesses for a Better N.Y. v. Angello*, 341 F. App'x 701, 705 (2d Cir. 2009). The *Pike* balancing test, therefore, cannot support Plaintiffs' claims either.

In sum, Plaintiffs have not demonstrated a likelihood of success on the merits of their Dormant Commerce Clause claim under either the traditional doctrine or *Pike* balancing and thus fail to justify the issuance of emergency injunctive relief.

2. The Due Process Clause

Plaintiffs also argue that the Act violates the Due Process Clause under two separate theories: first, the Act is void under the Clause because it is unconstitutionally vague; and second, the Act constitutes an unreasonable exercise of the State's police power. Neither theory is availing.

Void for Vagueness. Unlike Plaintiffs other claims, which challenge the Act in its entirety, Plaintiffs specifically target Section 7 of the Act, N.J. STAT. ANN. § 34:8D-7, for purposes of their void-for-vagueness claims. (Compl., ECF No. 1, ¶¶ 72–76). Section 7, the so-called "pay provision," (a) restricts the amount a temporary staffing agency may charge a client that permanently hires a temporary worker as a placement fee, § 34:8D-7(a); and (b), perhaps most

controversially, provides that—

> [a]ny temporary laborer assigned to work at a third party client in a designated classification placement shall not be paid less than the average rate of pay and average cost of benefits, or the cash equivalent thereof, of employees of the third party client performing the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions for the third party client at the time the temporary laborer is assigned to work at the third party client,

§ 34:8D-7(b). The Act imposes a $5,000 penalty for each violation of the Section and holds third-party clients jointly and severally liable for such violations. §§ 34:8D-7(c)–(d). Plaintiffs argue that Subsection (b) in particular, and Subsection (a) in relation to Subsection (b),[15] are unconstitutionally vague on their face and therefore void because they offer no guidance as to how to calculate the required wages to be paid and benefits to be provided. (Plas.' Br., ECF No. 1-2 at 21–23). Although these provisions of the Act are not a picture of clarity, they are not so lacking as to be deemed unconstitutionally vague on their face.

Plaintiffs bear a weighty burden in attempting to prove that Section 7 is void for vagueness. A law is unconstitutionally vague under the Due Process Clause only if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). Although more typically applied in the criminal context, the doctrine extends to civil enforcement as well. *E.g.*, *Dailey v. City of Phila.*, 417 F. Supp. 3d 597, 616 (E.D. Pa. 2019), *aff'd*, 819 F. App'x 71 (3d Cir. 2020). In the civil enforcement context, the test for vagueness is "especially lax": to be unconstitutionally vague, a civil statute that regulates economic activities must be "so vague as to be no rule or standard at all." *FTC v. Wyndham Worldwide Corp.*, 799

[15] Plaintiffs argue that because the placement fee cap imposed by Subsection (a) depends on the amount of wages paid to the temporary employee, Subsection (b)'s requirements with respect to wages infect Subsection (a) with the same unconstitutional vagueness. (Plas.' Br., ECF No. 1-2 at 23 n.1).

F.3d 236, 250 (3d Cir. 2015) (quoting *CMR D.N. Corp. v. City of Phila.*, 703 F.3d 612, 631–32 (3d Cir. 2013)). Applying this standard, a plaintiff must show that "the law is impermissibly vague in all of its applications." *CMR*, 703 F.3d at 631–32. Plaintiffs cannot do so here.

In their briefing and at oral argument, Plaintiffs raised questions about how the proper pay and benefits were to be calculated under Section 7 and, specifically, whether certain factors are required to be considered when performing the calculation. Should employers consider length of service? Time of work—as in nights and weekends? Merit? Quality or quantity of production? Workplace location? Travel? Education? Training or experience? (Plas.' Reply, ECF No. 19 at 1–2). However, by raising these questions, Plaintiffs have given away the game: they are tacitly admitting that they know *exactly* the sort of relevant factors that ought to be considered in identifying a proper comparator-employee for the calculation of pay and benefits under the Act. To be sure, Section 7 does not tell Plaintiffs explicitly which factors are most important or how they should be weighed. § 34:8D-7(b). But that is not required for the Act to survive a void-for-vagueness challenge. *CMR*, 703 F.3d at 631–32 ("That [a law] may contain some ambiguities does not render it impermissibly vague.").

That Plaintiffs have been able to identify (at least some) of the relevant factors necessary for identifying comparator-employees is no surprise; they are sophisticated commercial actors who engage in this sort of practice all the time. Indeed, all sorts of federal and state employment laws require similar cross-employee comparisons: the federal Equal Pay Act, 29 U.S.C. § 206(d)(1), and New Jersey Law Against Discrimination as amended by the Diane B. Allen Equal Pay Act, N.J. STAT. ANN. § 10:5-12(t), serve as perfect examples. Case law interpreting these statutes and others is abundant, and Plaintiffs, their members, and their members' third-party partners have been abiding by these laws for decades. In short, although the application to temporary workers is

novel, they know how to do this.

Plaintiffs respond that the Act is different from those other employment statutes because the relevant information needed to conduct the necessary calculations belongs to their third-party partners, and those partners will refuse to provide it because they view the information as "proprietary." (Hr'g Tr., ECF No. 24 at 19:15–20:3). Setting aside the fact that this problem seems easily solved by the sort of confidentiality provisions routinely added to business contracts, really, the issue is a red herring. This burden, and the reticence of clients to provide this information might make compliance more difficult, but it does not make Section 7 unconstitutionally vague. *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 915 (3d Cir. 1990) ("Inability to satisfy a clear but demanding standard is different from inability in the first instance to determine what the standard is."). Plaintiffs know the information they need and from where it must be obtained, just not how to get it (or, at least, so they say).

As the foregoing demonstrates, Section 7 is not facially vague. Further undermining Plaintiffs' claims is the fact that, just days ago, Defendants issued a Notice of Proposal that published a series of proposed regulations to further clarify and implement the Act, including Section 7. *See* Temporary Laborers (proposed July 21, 2023) (to be codified at N.J. ADMIN. CODE § 12:72-1.1, *et seq.*), https://www.nj.gov/labor/research-info/legalnotices.shtml.[16] Subchapter 7 of the Notice provides fairly comprehensive instructions for the calculation of appropriate wages and benefits. §§ 12:72-1.1–7.3. And Plaintiffs are allowed—and, indeed, invited—to provide comments to clarify these proposed regulations further before they are finalized and promulgated.

[16] Plaintiffs have stated their intent to challenge these proposed regulations as *ultra vires*, (Plas.' Br., ECF No. 19 at 10; Hr'g Tr., ECF No. 24 at 38:25–39:10), but that question is not before the Court because, among other reasons, it lacks jurisdiction to decide it, *see Pennhurst*, 465 U.S. at 117. Regardless though, even if a New Jersey court were to strike down these regulations as invalid, Section 7 still would not be unconstitutionally vague on its face, as discussed above.

Id. Whatever questions Plaintiffs still might have, now is their chance to get the answers they need. Further, Defendants have represented that until the final adoption of the proposed regulations, they will not interpret nor enforce Section 7 in a contrary manner. Thus, Plaintiffs now have even more detailed guidance and certainty as to how the Defendants intend to interpret and enforce Section 7.

In response, Plaintiffs suggest that the proposed rules are "vague and impossible to decipher" and that the Act "is even less clear by this publication." (Plas.' Letter, ECF No. 33 at 2). Further, they argue that "it is *impossible* to summarize the placement fee calculations set forth at N.J.A.C. 12:72-6.2 because their complexity is *astounding* and also dependent upon the *impossible* determination of 'daily cost . . . of benefits provided to the temporary laborer.'" (ECF No. 33 at 2 (emphasis added)). These are undoubtedly the same arguments and claims that Plaintiffs made when lobbying before the Legislature against the Act's adoption. And in any event, their complaints are misplaced. It is not for *this Court* to determine whether the policies served by the Act are worthy of pursuit, or whether it is wise to impose the likely burdens to follow upon New Jersey businesses like Plaintiffs' members. *Sammon v. N.J. Bd. of Med. Exam'rs*, 66 F.3d 639, 645 (3d Cir. 1995) (explaining that courts must not "second guess the legislature on the factual assumptions or policy considerations underlying the statute" and are "not authorized to determine . . . whether the desired goal has been served"). These were questions for the Legislature and are now for regulators. Plaintiffs should submit comments regarding whatever errors, inconsistencies, and so-called impossibilities they find so that they might be corrected or clarified.

In sum, Section 7 is not unconstitutionally vague on its face, and Plaintiffs now have the benefit of additional proposed regulations for greater clarity. Plaintiffs thus are not likely to succeed on the merits of their Due Process claim under this theory and cannot justify emergency injunctive relief.

Unreasonable Exercise of the Police Power. Although the State of New Jersey undoubtedly possesses broad police powers that "extend[] beyond health, morals and safety, and comprehend[] the duty, within constitutional limitations, to protect the well-being and tranquility of a community," *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949), Plaintiffs argue the Act must be struck down as an "unreasonable" exercise of those powers under *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). (Plas.' Br., ECF No. 1-2 at 24).[17]

The *Goldblatt* Court reaffirmed the nineteenth-century rule that "[t]o justify the state in interposing its authority in behalf of the public, it must appear—[f]irst, that the interests of the public require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Id.* at 594–95 (alterations omitted) (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894)). But in the very next sentence, the Court added the caveat that "[e]ven this rule is not applied with strict precision, for this Court has often said that 'debatable questions as to reasonableness are not for the courts but for the Legislature.'" *Id.* (alterations omitted) (quoting *Sproles v. Binford*, 286 U.S. 374, 388 (1932)). In effect, then, the *Goldblatt* Court explained that to comport with the Due Process Clause, acts of a state legislature must be able to survive what we now call rational basis review. *Compare id. with City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation . . . will be sustained if [it is] rationally related to a legitimate state interest."). Under that standard, a statute must be upheld if "(1) there is a legitimate state interest that (2) could

[17] The Court notes that Plaintiffs' claims under this theory are unusual in that they do not involve any sort of zoning ordinance or other regulation of real property, which are seemingly always the basis for unreasonable-exercise-of-the-police-power claims. *E.g.*, *Hartman v. Township of Readington*, No. 02-02017, 2008 WL 2557544 (D.N.J. June 23, 2008). Despite not aligning with the usual factual predicate for these claims, the Court analyzes them consistent with those precedents all the same.

be rationally furthered by the statute." *E.g.*, *Mech. Contractors Ass'n of N.J., Inc. v. New Jersey*, 541 F. Supp. 3d 477, 493 (D.N.J. 2021) (quoting *N.J. Retail Merch. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 398 (3d Cir. 2012)). The Act easily meets both requirements.

The Act is—by its plain terms—"intended to further protect the labor and employment rights of [temporary] workers." N.J. STAT. ANN. § 34:8D-1(d). As Plaintiffs acknowledge, this a perfectly legitimate state interest. (Plas.' Reply, ECF No. 19 at 12). The Act—and particularly Section 7, which is the primary target of Plaintiffs' objections, (Plas. Br., ECF No. 1-2 at 23)—obviously furthers that interest. It seeks to provide temporary workers with greater transparency, fair pay, workplace safety, and heightened protection from retaliation. § 34:8D-1, *et seq*. Plaintiffs might not believe that the Act will accomplish those goals, or that it was wise for the State to prioritize the rights of temporary workers over those of New Jersey businesses, but that does not render it unconstitutional. *E.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) ("Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment.").

In reality, what Plaintiffs actually fear is that the Act will spell the demise of the temporary staffing industry in New Jersey. There is no doubt that the Act, and specifically Section 7, imposes substantial and costly burdens upon on that industry. However, another goal of the Act is to encourage employers to hire more *permanent* employees, rather than utilizing temporary workers. Although neither the text of the Act nor its legislative history expressly state such a goal, nor did Defendants confirm it as a goal at argument when questioned by the Court, (ECF No. 24 at 77–12–17), the newly proposed regulations indeed identify the creation of more permanent employment jobs as an aim of the statute. Again, it is not the Court's role to evaluate the wisdom or potential effectiveness of the State's chosen course of policymaking; its task is solely to

determine whether "any reasonably conceivable state of facts . . . could provide a rational basis" for the State's action. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993). This Act easily passes that test.

Because the Act readily survives rational basis review, it is not an unreasonable exercise of the police power under the Due Process Clause. Plaintiffs' claims are not likely to succeed under this theory and cannot justify emergency injunctive relief.

3. The Equal Protection Clause

Plaintiffs also suggest that "[i]n enacting the [Act], New Jersey has unfairly singled out the staffing industry," and thereby has violated the Equal Protection Clause. (Compl., ECF No. 1, ¶ 84).[18] Unfair or otherwise, however, Plaintiffs acknowledge—as they must, *e.g.*, *Mech. Contractors*, 541 F. Supp. 3d at 484–85—that, because the industry and its workers are not a suspect class, the Act again needs only to survive rational basis review to pass constitutional muster. (Plas.' Br., ECF No. 1-2 at 25–26). And, for precisely the same reasons discussed above with respect to Plaintiffs' police-power challenge, *see supra* Section IV.B.2, it does.

Plaintiffs' claims under the Equal Protection Clause are not likely to succeed and cannot justify injunctive relief here.

4. The Privileges or Immunities Clause

As Defendants rightly note in their Opposition, "Plaintiffs make no mention of Count Five, the Privileges and Immunities Clause claim, in their application for emergency relief." (ECF No. 18 at 32 n.11). This was likely for good reason: the Privileges & Immunities Clause "has been

[18] The Court must note that Plaintiffs have at no point identified in what way their members have been subject to *discrimination* relative to some similarly-situated group—a necessary element of an Equal Protection claim. *E.g.*, *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 151 (3d Cir. 2005). Indeed, they have failed to even identify who that similarly-situated group might be. Regardless though, because the Act survives rational basis review, Plaintiffs' Equal Protection claim is not likely to succeed and cannot justify emergency injunctive relief.

interpreted not to protect corporations" like Plaintiffs' members. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460–61 (2019) (citing *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 656 (1981)). Indeed, Plaintiffs all but conceded the claims at oral argument. (Hr'g Tr., ECF No. 24 at 56:5–25). Because Plaintiffs' members plainly fall outside the scope of the Privileges & Immunities Clause's protection, their claims under the Clause are not likely to succeed, and thus cannot support the grant of emergency injunctive relief.

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Because the Court concludes that Plaintiffs have failed to show a likelihood of success on the merits of their claims—one of the two "most critical," "gateway" factors in the temporary and preliminary injunctive relief analysis, *Reilly*, 858 F.3d at 179 (quoting *Nken*, 556 U.S. at 434)—the Court need not reach and offers no opinion regarding the additional factors, potential harm to non-moving parties and the public interest. *See id.* at 174, 179 (noting that courts need only consider these additional factors "when they are relevant" and "[i]f the[] gateway factors are met").

CONCLUSION

For the foregoing reasons, Plaintiffs' application for emergency injunctive relief, (ECF No. 1), is **DENIED**. An appropriate Order accompanies this Opinion.

Christine P. O'Hearn

CHRISTINE P. O'HEARN
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NEW JERSEY STAFFING ALLIANCE, *et al.*,

Plaintiffs,

v.

CARI FAIS, *Acting Director of the New Jersey Division of Consumer Affairs in the Department of Law & Public Safety*, *et al.*,

Defendants.

No. 1:23-cv-02494

ORDER

O'HEARN, District Judge.

THIS MATTER comes before the Court on the Complaint and Application for an Order to Show Cause for a Temporary Restraining Order and Preliminary Injunction filed by Plaintiffs New Jersey Staffing Alliance, New Jersey Business & Industry Association, and American Staffing Association ("Plaintiffs"). (ECF No. 1). The Court heard oral argument on the application pursuant to Local Rule 78.1 on June 13, 2023. For the reasons set forth in the Court's corresponding Opinion,

IT IS HEREBY on this 26th day of July, 2023,

ORDERED that the Plaintiffs' application for emergency injunctive relief, (ECF No. 1), is **DENIED**.

Christine P. O'Hearn

CHRISTINE P. O'HEARN
United States District Judge