

What impact will the recently enacted New Jersey Temporary Workers' Bill of Rights have on temporary staffing agencies and their clients?

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A first-in-the-nation law that creates new legal protections for temporary workers recently took full-effect in New Jersey, despite opposition from the business community, a conditional veto by the governor and a legal challenge in federal court. The New Jersey Temporary Workers' Bill of Rights (the "Act") provides new protections for temporary workers in certain occupations and enhanced administrative oversight and regulation of temporary staffing agencies, referred to in the Act as "temporary help service firms" ("Firms"), and the companies at which their temporary workers are placed, the "third party clients." N.J. Stat. § 34:8D-1—34:8D-13. The Act seeks to promote pay equity by requiring equal pay and benefits (or the cash equivalent thereof) for covered temporary workers relative to similarly situated direct-hire employees. The Act, however, imposes substantial obligations and costs on Firms and their third party clients. While the Act's full impact on the temporary staffing industry remains to be seen, it may foreshadow things to come as other states consider new pay equity laws and other worker protections. A similar law has already gone into effect in Illinois. See 2023 Ill. HB 2862, ILL. P.A. 437.

The Act took full effect on August 5, 2023. The legislature originally drafted the Act to apply to all temporary workers in New Jersey. However, Governor Murphy conditionally vetoed that version and recommended several changes. See Conditional Veto Statement, A.1474 (First Reprint), N.J. LEG. 3 (Sept. 22, 2022). While expressing support for the Act's objectives, he recommended limiting its application 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." The legislature accepted his recommendations, and Governor Murphy signed the Act into law on February 6, 2023.

New Jersey's Department of Labor and Workforce Development issued proposed regulations implementing certain sections of the Act on July 21, 2023. See N.J.A.C. 12:72-1–10. The agency may further amend these regulations following a 60-day public

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comment period. The Division of Consumer Affairs will enforce sections of the Act concerning the certification of Firms, and will promulgate its own rules to implement those sections.

Scope of the Act. Consistent with Governor Murphy's recommendations, the Act applies only to "temporary laborers," which comprise a subset of the over 127,000 temporary workers in New Jersey. See N.J. Stat. § 34:8D-1–8D-2. The Act defines a "temporary laborer" as "a person who contracts for employment in a designated classification placement with a temporary help service firm." *Id.* § 34:8D-2. A "designated classification placement," in turn, is the assignment by a Firm of a temporary laborer to perform work in specified occupational categories as defined by the federal Bureau of Labor Statistics. These occupational categories include: (i) certain protective service occupations (e.g., security guards, lifeguards); (ii) food preparation and service; (iii) building and grounds cleaning and maintenance; (iv) personal care and service (e.g., hairdressers, childcare workers, concierges); (v) construction; (vi) construction trades (e.g., electricians, carpenters); (vii) installation maintenance and repair; (viii) production (e.g., butchers, metal workers, drycleaners); and (iv) transportation and logistics.

The proposed rules clarify that the Act applies to each Firm that "is located, operates, or transacts business within New Jersey." N.J.A.C. § 12:72-1.1. They further specify that the Act applies to each temporary laborer who is employed by a covered Firm who either: (1) has been assigned to work in a designated classification placement in New Jersey; or (2) has been assigned to work in a designated classification placement outside of New Jersey, but who has his or her primary residence in New Jersey. The Act also applies to third party clients with whom Firms make designated classification placements.

Pay equity. The Act requires that Firms pay temporary laborers no less than the average rate of pay and cost of benefits, or the cash equivalent thereof, as direct-hire employees of the third-party client, who perform the same or substantially similar work on jobs that require equal skill, effort and responsibility and that are performed under similar working conditions, *i.e.*, "comparator employees." See N.J. Stat. § 34:8D-7; N.J.A.C. § 12:72-2.1.

The proposed rules add significant detail to the Act's pay equity provision. See N.J.A.C. § 12:72-7. A Third party client must identify comparator employees from its own staff for each temporary laborer it uses, and supply the Firm with a list of the hourly rate of pay and cost of benefits for each one. The proposed rules provide detailed instructions for calculating the average rate of pay and cost of benefits. To calculate the cost per hour of benefits, the annual cost to the third party client of benefits for a direct-hire employee is divided by 2,080 hours. The Firm then uses this information to determine the hourly wage rate and value of benefits it must pay the temporary laborer, pursuant to a calculation method set forth in the proposed rules.

The regulations define "benefits" to include health insurance, life insurance, disability insurance, paid time off, training and pension, that an employer provides in excess of what is required by law. N.J.A.C. § 12:72-2.1.

The proposed rules list 12 principles for third-party clients to apply to determine whether a temporary laborer and a third party client employee are performing substantially similar work. N.J.A.C. 12:72-6.2. They provide that substantially similar work “should be viewed as a composite of skill, effort and responsibility performed under similar working conditions.” While job titles and job descriptions are relevant, the analysis should focus on the actual job duties performed. Experience, ability, education and training required to perform a job are relevant factors; but, the number of years of service (*i.e.*, seniority) of a third party client employee and a third party client’s use of a merit system for compensation are not.

Post-Employment Restrictions. Firms may not restrict a temporary laborer from accepting a “permanent position” with a third party client to which the Firm has assigned the laborer to work, or from accepting a “permanent position for any other employment.” See N.J. Stat. § 34:8D-7. Although Firms may not prohibit third party clients from directly hiring their temporary laborers, they may charge third party clients a placement fee. The proposed rules set forth the method to use to determine the maximum placement fee that may be charged. N.J.A.C. 12:72-6.2.

Certification. In recognition of the “large, though unknown, number of unlicensed temporary help service firms that operate outside the purview of law enforcement,” N.J. Stat. § 34:8D-1(a), the Act requires all Firms who make designated classification placements to obtain certification to do so from the New Jersey Division of Consumer Affairs. *Id.* § 34:8D-8.

Anti-retaliation. Under the Act, a rebuttable presumption of retaliation arises if a Firm terminates or imposes disciplinary action on a temporary laborer within 90 days of the temporary laborer’s exercise of rights protected under the Act. N.J. Stat. § 34:8D-10.

Enforcement. The Act authorizes the commissioner to issue penalties for non-compliance. It also allows temporary laborers to bring individual or class action lawsuits against Firms for violations of this Act. The Act imposes joint and several liability on Firms and third party clients for the violation of multiple provisions.

New Hire Notice and Recordkeeping Requirements. Whenever a Firm agrees to send a temporary laborer to work in a designated classification placement, it must provide that worker with a new hire notice at the time of dispatch. N.J. Stat. § 34:8D-3. The new hire notice must contain detailed information, including, among other things, the name of the temporary laborer; the name and contact information for the Firm, its workers’ compensation carrier, the third party client and the Department; the nature of the work to be performed; the wages offered; the length of the assignment, if known; whether any special clothing, protective equipment, or training are required and who will bear such the costs, and whether a meal or equipment will be provided and their costs, if any.

Firms also must keep detailed records for each designated classification placement they make. Third party clients must remit time records for temporary laborers to Firms to enable them to satisfy their recordkeeping requirements. N.J. Stat. § 34:8D-4.

Payment of Wages and Itemized Wage Statements. Firms must provide temporary laborers detailed itemized wage statements either on the laborer's paycheck stub or a form approved by the commissioner. N.J. Stat. § 34:8D-6. The wage statement must contain the name and address of each third party client for whom the temporary laborer performed work, information on the number of hours worked, the rate of pay for each hour, the total pay period earnings, the amount and purpose of each deduction made, and the maximum placement fee the Firm may charge a third party client for directly hiring the temporary laborer.

The Act also imposes several regulations on the payment of wages to temporary laborers, including with respect to the method and frequency of payments. It prohibits deductions for cash-checking fees, criminal background checks, consumer credit reports and drug tests, and regulates the amount of deductions for meals and equipment. N.J. Stat. § 34:8D-6. It also requires a Firm to pay a temporary laborer who is contracted to work at a third party client, but is not used by the third party client, a minimum of four hours at the agreed upon rate of pay, or a minimum of two hours if the temporary laborer is contracted to work at another location during the same shift.

Transportation. Firms and third party clients may not charge a fee for transportation they provide to temporary laborers to transport them to or from a worksite. N.J. Stat. § 34:8D-5. A Firm may not require a temporary laborer to use transportation the firm provides, and if it does provide transportation, it must adhere to basic safety requirements.

Public Policy Objectives: The “findings and declarations” section of the Act states that the share of Black and Latino temporary workers far outstrips their proportion in the workforce and that they are heavily concentrated in low-wage occupations. See N.J. Stat. § 34:8D-1. Further, full-time temporary workers earn 41% less than direct-hire employees, and are far less likely to receive employer-sponsored retirement and health benefits. Although the Act seeks to address these societal problems, it also disincentivizes companies from using temporary laborers due to increased regulatory burdens and costs. In apparent recognition of the negative financial impact the Act may have on Firms, the Department also identified a countervailing effect on the creation of more permanent jobs, anticipating that some third-party clients will determine that it is now more advantageous for them to hire permanent employees rather than continuing to use temporary labor.

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