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RULE PROPOSALS

**LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF WORKFORCE DEVELOPMENT
STATE EMPLOYMENT AND TRAINING COMMISSION**

42 N.J.R. 2715(a)

Proposed New Rules: N.J.A.C. 12:42-3

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

Local Workforce Investment Areas and Local Workforce Investment Boards: Performance, Technical Assistance, Corrective Actions and Penalties

Authorized By: Harold J. Wirths, Commissioner, Department of Labor and Workforce Development and Dennis M. Bone, Chair, State Employment and Training Commission.

Authority: *N.J.S.A. 34:1-20, 34:1A-3(e)* and *34:15C-8; 29 U.S.C. §2871* and *20 CFR 666.420*.

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

Proposal Number: PRN 2010-284.

A **public hearing** on the proposed new rules will be held on the following date at the following location:

Wednesday, December 8, 2010
10:00 A.M. to 12:00 Noon
New Jersey Department of Labor and Workforce Development
John Fitch Plaza
13th Floor Auditorium
Trenton, New Jersey

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

Submit written comments by January 14, 2011 to:

David Fish, Regulatory Officer
Office of Legal and Regulatory Services
P.O. Box 110, 13th Floor

Trenton, New Jersey 08625-0110
Fax: (609) 292-8246

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The agency proposal follows:

Summary

The Department of Labor and Workforce Development (Department) and the New Jersey State Employment and Training Commission (SETC) are jointly proposing new rules at N.J.A.C. 12:42-3 in part to comply with 29 U.S.C. §2871 and 20 CFR 666.100 et seq., which require that the State have a system in place to hold local workforce investment areas (local areas) accountable for meeting "local performance measures" as that term is defined at 29 U.S.C. §2871(c). In addition, the proposed new rules would permit the State in its statutory oversight of the local areas to take corrective action and/or impose penalties when a local area, (1) has failed to cooperate or comply with the State's performance review and technical assistance activities and services; (2) has failed to cooperate or comply with a corrective action plan; (3) has willfully hindered the Commissioner of Labor and Workforce Development or any Department representative in the performance of his or her duties in the enforcement of the proposed new subchapter; (4) has failed to comply with Federal law or regulations; (5) has failed to comply with State statutes or rules; or (6) has failed to comply with one or more contract provisions.

N.J.S.A. 34:15C-8 indicates that the SETC shall establish quantifiable performance standards for evaluating the workforce investment system and guidelines for procedures to encourage and enforce compliance with those standards. The law goes on to state that the SETC "shall establish the standards and procedures in conjunction with any department or commission which funds or administers workforce investment programs." Proposed new N.J.A.C. 12:42-3 would establish the procedures to encourage and enforce compliance with performance standards. In New Jersey, the Department of Labor and Workforce Development is responsible for funding the local areas and their workforce investment programs. The Department is also a party to and administers the grant agreements by which those funds are provided to the local areas. Consequently, pursuant to *N.J.S.A. 34:15C-8*, the SETC has chosen to work in conjunction with the Department in developing the procedures contained within proposed new Subchapter 3 and, as indicated earlier, is proposing the new subchapter jointly with the Department.

A summary of the proposed new sections follows:

N.J.A.C. 12:42-3.1 would set forth the purpose and scope of the new subchapter. The purpose would be to ensure accountability of local areas in meeting the needs of employers and job seekers, to ensure that local areas meet local performance measures and to ensure adequate return from local areas on Federal and State investments. The subchapter would apply to all local areas and local workforce investment boards (local boards) throughout the State.

N.J.A.C. 12:42-3.2 would set forth definitions of the words and terms used within the proposed new subchapter.

N.J.A.C. 12:42-3.3 would indicate that a local area shall meet or exceed local performance measures, as that term is defined at 29 U.S.C. §2871(c). N.J.A.C. 12:42-3.3 would further state that failure to meet those local performance measures may result in the need for technical assistance or the imposition of corrective actions and/or penalties. Finally, the section would indicate that a local area's achievement of high levels of performance may result in the Department providing incentives for the local area.

N.J.A.C. 12:42-3.4 would explain the consequences to a local area for the first year in which the local area fails to meet or exceed local performance measures.

N.J.A.C. 12:42-3.5 would explain the consequences to a local area for the second consecutive year in which the local area fails to meet or exceed local performance measures.

N.J.A.C. 12:42-3.6 would describe causes other than failure to meet or exceed local performance measures for which a local area may be subject to corrective actions and/or penalties.

N.J.A.C. 12:42-3.7 would set forth the standard to be applied by the Department when determining the appropriateness of imposing corrective actions and/or penalties.

N.J.A.C. 12:42-3.8 would list the corrective actions that may be imposed by the Department against a local area for cause.

N.J.A.C. 12:42-3.9 would list the penalties that may be imposed by the Department against a local area for cause.

N.J.A.C. 12:42-3.10 would set forth the procedure for issuance of a corrective action and/or penalty by the Department.

N.J.A.C. 12:42-3.11 would set forth the appeal rights of local areas and the procedures for exercise by the local areas of those rights.

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

Social Impact

The proposed new subchapter would have a positive social impact in that it would give local areas notice as to possible consequences for failure to meet or exceed local performance measures. It would also give the local areas notice that there will be consequences for failure to cooperate or comply with the State's performance review and technical assistance activities and services, for failure to cooperate or comply with a corrective action plan, for willfully hindering the Commissioner of Labor and Workforce Development or any Department representative in the performance of his or her duties in the enforcement of the proposed new subchapter, for failure to comply with Federal law and regulations, for failure to comply with State statutes or rules or for failure to comply with one or more contract provisions. In addition, the proposed new subchapter would contain a description of the appeal rights of local areas and would set forth procedures for local areas to pursue those appeal rights, if necessary. This information would better equip local areas to make informed decisions as to the operations of their local workforce investment systems.

The proposed new subchapter would also provide to the State the tools necessary to ensure that local areas are effectively spending funds that are being provided to them for the purpose of achieving the objective of the Statewide workforce investment system, namely, to assist the individuals served by the system in attaining and maintaining high levels of [page=2716] productivity and earning power through preparation for employment in occupations with significant opportunities for career advancement. In that the proposed new subchapter would enable the State to hold local areas accountable and to ensure that local areas are making real progress toward achieving the objectives of the workforce investment system, the proposed new subchapter would also benefit those throughout the State who are supposed to be served by the workforce investment system. Similarly, since it is taxpayer monies which fund the local areas' activities, increased accountability for the spending of those monies would, of course, inure to the benefit of taxpayers. In the event of a sanction, the State will make every effort to avoid disruption of services to individuals who are clients of the One-Stop system.

Economic Impact

The proposed new subchapter would have a positive economic impact in that it would enable the State to ensure that the vast quantities of taxpayer monies being spent by local areas to achieve the objectives of the Statewide workforce investment system are being spent appropriately, which is to say, that those monies are being spent in such a way as to achieve meaningful, quantifiable local performance measures. As to underperforming or malfeasant local areas, the proposed new subchapter would have a negative economic impact in terms of the corrective actions and/or penalties that may be imposed on or against them by the State. Nevertheless, these sanctions are necessary in order to ensure full accountability of the local areas and so long as local areas meet or exceed their local performance measures, cooperate with the State in its efforts to ensure achievement of the system's objectives, abide by the terms of their contracts with the State and manage to avoid running afoul of Federal or State laws or regulations, they should have no fear of any negative economic impact of the proposed new subchapter.

Federal Standards Statement

In that the proposed new subchapter would establish a procedure for imposing sanctions on local areas for poor performance, it would not exceed standards or requirements imposed by Federal law. That is, *29 U.S.C. §2871* and *20 CFR 666.420* expressly require the State to develop a system for the imposition of such sanctions against local areas for failure to meet or exceed local performance measures. As to that portion of the proposed new subchapter that would also impose sanctions for "other causes"; that is, causes other than failure to meet or exceed local performance meas-

ures, the proposed new subchapter would exceed requirements imposed by Federal law. However, it is the SETC's and the Department's firm belief that in order to effectively oversee the Statewide workforce investment system, local areas must be held accountable for the latter conduct in addition to being held accountable for poor performance. There would be no additional cost to the State for imposing sanctions against local areas on the basis of the "other causes" listed above, whereas the possible cost to taxpayers in terms of misspent funds in the event that the Department allowed such onerous conduct to go unaddressed could be significant.

Jobs Impact

The proposed new subchapter would have no impact on either the generation or loss of jobs.

Agriculture Industry Impact

The proposed new subchapter would have no impact on the agriculture industry.

Regulatory Flexibility Statement

The proposed new subchapter would not impose any reporting, recordkeeping or compliance requirement on small businesses as that term is defined in the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16* et seq., since only local areas and local boards would be affected by the subchapter.

Smart Growth Impact

The proposed new subchapter would not have an impact on the achievement of smart growth and the implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact

The proposed new subchapter would not evoke a change in the average costs associated with housing. The basis for this finding is that the proposed new subchapter pertains to the State's oversight of local workforce investment areas and has nothing whatsoever to do with housing.

Smart Growth Development Impact

The proposed new subchapter 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 subchapter pertains to the State's oversight of local workforce investment areas and has nothing whatsoever to do with housing production, either within Planning Areas 1 or 2 or within designated centers, or anywhere in the State of New Jersey.

Full text of the proposed new rules follows:

SUBCHAPTER 2. (RESERVED)

SUBCHAPTER 3. LOCAL WORKFORCE INVESTMENT AREAS AND LOCAL WORKFORCE INVESTMENT BOARDS: PERFORMANCE, TECHNICAL ASSISTANCE, CORRECTIVE ACTIONS AND PENALTIES

12:42-3.1 Purpose and scope

(a) The purpose of this subchapter is to ensure accountability of local areas in meeting the needs of employers and job seekers, to ensure that local areas meet local performance measures, and to ensure adequate return from local areas on Federal and State investments.

(b) This subchapter applies to all local areas and local boards throughout the State.

12:42-3.2 Definitions

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

"Assistant Commissioner" means the Assistant Commissioner of Workforce Development within the New Jersey Department of Labor and Workforce Development or his or her designee.

"Commission" means the New Jersey State Employment and Training Commission.

"Commissioner" means the Commissioner of the New Jersey Department of Labor and Workforce Development or his or her designee.

"Corrective action plan" means a plan developed and imposed by the Department, which directs the local area to take Department-identified actions within a specified time frame, which actions are designed to correct specific instances of non-compliance by the local area or other local area deficiencies.

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

"Local area" means a local workforce investment area designated under *29 U.S.C. §2831*.

"Local board" means a local Workforce Investment Board as described in *29 U.S.C. §2832(b)*.

"Local performance measures" means "local performance measures" as that term is defined at *29 U.S.C. §2871(c)*.

12:42-3.3 Performance

(a) A local area shall meet or exceed local performance measures.

(b) When setting local performance measures for a particular local area, local conditions may be taken into consideration including, but not limited to, specific economic conditions and demographic characteristics of the local area.

(c) A local area's achievement of high levels of performance may result in the Department providing incentives for the local area.

(d) A local area's failure to meet local performance measures may result in technical assistance under N.J.A.C. 12:42-3.4, corrective actions under N.J.A.C. 12:42-3.8 and/or penalties under N.J.A.C. 12:42-3.9.

[page=2717] 12:42-3.4 Year one--failure to meet or exceed local performance measures

(a) If in a program year, a local area fails to meet or exceed local performance measures, the Department shall offer a series of interventions including basic technical assistance and development of a performance improvement plan.

(b) A performance improvement plan is a plan that is jointly developed between the Department and the local area to assist the local area with improving compliance or performance through specific technical assistance or training, which may include the following:

1. Identification of one or more specific performance improvement issues;
2. Assessment of specific technical assistance or training needs;
3. Selection of one or more specific technical assistance or training activities to be implemented;
4. Identification of the appropriate entities to provide the technical assistance or training, including the Department, the Commission, other local areas or other entities;
5. Identification of a timeline for completion of the technical assistance or training; and

6. Specific dates for reassessment of technical assistance or training needs and completion of the specific technical assistance or training.

12:42-3.5 Year two--failure to meet or exceed local performance measures

If for two consecutive program years, a local area fails to meet or exceed the same local performance measure, the Department may assess corrective actions under N.J.A.C. 12:42-3.8 and/or penalties under N.J.A.C. 12:42-3.9 against a local area and/or a local board.

12:42-3.6 Other causes for corrective actions and penalties

(a) The Department may assess corrective actions under N.J.A.C. 12:42-3.8 and/or penalties under N.J.A.C. 12:42-3.9 against a local area and/or a local board for any of the following:

1. Failure to cooperate or comply with the Department's performance review and technical assistance activities and services, including the performance improvement plan;
2. Failure to cooperate or comply with a corrective action plan;
3. Willfully hindering the Commissioner or any Department representative in the performance of his or her duties in the enforcement of this subchapter;
4. Failure to comply with Federal law or regulations;
5. Failure to comply with State statutes or rules; or
6. Failure to comply with one or more contract provisions.

12:42-3.7 Standard for appropriateness of corrective actions and/or penalties

(a) In determining the appropriate corrective actions and/or penalties to assess against a local area and/or a local board under N.J.A.C. 12:42-3.8 and 3.9, respectively, the Department may consider the following factors:

1. The nature of the act(s) giving rise to the imposition of corrective actions and/or penalties by the Department; that is the severity, duration or extent of that act(s); and
2. The history of corrective actions and/or penalties imposed by the Department on the local area and/or the local board.

12:42-3.8 Corrective action

(a) Where cause exists under N.J.A.C. 12:42-3.5 or 3.6, the Department may require the local area and/or the local board to engage in any or all of the following corrective actions:

1. Participation in technical and quality assurance activities;
2. Participation in training;
3. On-site visits by the Department to monitor and assist with daily operations of the local area and/or the local board;
4. Cooperation with the Department in the Department's development of a corrective action plan for the local area;
5. Timely implementation of a corrective action plan;
6. Submission to the Department of additional and/or more detailed financial and/or performance reports;

7. Department-directed meetings between Department officials, the local board chair, local board members, the local board's Executive Director and/or the local area's elected officials;
8. Formal Department presentation to the local area's elected officials and/or local board members; or
9. Any other corrective action deemed appropriate by the Department.

12:42-3.9 Penalties

(a) Where cause exists under N.J.A.C. 12:42-3.5 or 3.6, the Department may impose any or all of the following penalties on the local area and/or the local board:

1. Require payment by reimbursement only, with required supporting documentation;
2. Delay, suspend or deny contract payments;
3. Reduce or deobligate local area funds;
4. Find local area ineligible for additional discretionary funds;
5. Terminate a contract between the Department and the local area and/or the local board;
6. Restructure the local board, including decertification of the current local board and appointment and certification of a new local board;
7. Merge the local area into one or more other local areas;
8. Prohibit the use of particular service providers or One-Stop partners that have been identified as achieving poor levels of performance; or
9. Any other penalty deemed appropriate by the Department.

12:42-3.10 Corrective action and penalty determinations

(a) In each instance where the Assistant Commissioner intends to issue a corrective action and/or penalty determination, he or she shall first transmit to the Commission a written proposed corrective action and/or penalty determination.

(b) The Commission shall, within 60 days of its receipt of a proposed corrective action and/or penalty determination from the Assistant Commissioner under (a) above, return to the Assistant Commissioner a written recommendation with regard to the proposed corrective action and/or penalty.

(c) The Assistant Commissioner shall, within 30 days of receipt of the Commission's recommendation under (b) above with regard to a particular proposed corrective action and/or penalty, issue a written corrective action and/or penalty determination.

(d) The Assistant Commissioner may, when issuing a written corrective action and/or penalty determination under (c) above, accept or reject any portion of the Commission's recommendation or may accept or reject the Commission's recommendation in its entirety.

(e) All corrective action and penalty determinations under (c) above shall be issued in writing to the local board's Executive Director or administrative officer, to the local board's chair, to the chief elected official of the local area, to the fiscal agent of the local area and to the Commission.

(f) All corrective action determinations issued under (c) above shall contain the following information:

1. The cause for corrective action;
2. The corrective action required, including the timeline for completing the corrective action; and
3. Appeal rights under N.J.A.C. 12:42-3.11.

(g) All penalty determinations issued under (c) above shall contain the following information:

1. The cause for penalty;
2. The penalty and the effective date of the penalty; and
3. Appeal rights under N.J.A.C. 12:42-3.11.

12:42-3.11 Appeals

(a) If a local area and/or local board disagrees with the corrective action and/or penalty determination of the Assistant Commissioner under N.J.A.C. 12:42-3.10, the local area and/or local board may submit an appeal to the Commissioner in writing no later than 30 days after having received notice of the corrective action and/or penalty determination being appealed.

(b) All appeals submitted to the Commissioner in writing under (a) above shall state the basis for the appeal and shall include any documentary evidence that the local area and/or local board would like the Commissioner to review prior to rendering his or her decision.

[page=2718] (c) The Commissioner shall review the documentary evidence presented by the local area and/or local board and shall request any additional information or conduct any investigation necessary to render a decision.

(d) The Commissioner's decision shall be based on the written record and shall be rendered within 30 days after receipt of the appeal.

(e) If a local area and/or local board disagrees with the decision of the Commissioner under (d) above, it may appeal that decision to the Secretary of the United States Department of Labor under *20 CFR 667.650(b)* not later than 30 days after the local area receives the decision of the Commissioner.