



6 of 7 DOCUMENTS

NEW JERSEY REGISTER

Copyright © 2010 by the New Jersey Office of Administrative Law

VOLUME 42, ISSUE 24

ISSUE DATE: DECEMBER 20, 2010

RULE ADOPTIONS

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

42 N.J.R. 3061(b)

Adopted New Rule: N.J.A.C. 12:56-5.8

Use of Time Clocks; "Rounding" Practices

Proposed: July 6, 2010 at 42 N.J.R. 1308(a).

Adopted: November 23, 2010 by Harold J. Wirths, Commissioner, Department of Labor and Workforce Development.

Filed: November 23, 2010 as R.2010 d.297, **without change**.

Authority: N.J.S.A. 34:1-20.

Effective Date: December 20, 2010.

Expiration Date: January 26, 2011.

Summary of Hearing Officer's Recommendations and Agency Responses:

A public hearing regarding the proposed new rule was held on July 29, 2010 at the Department of Labor and Workforce Development. After reviewing the testimony presented at the public hearing and the written comments submitted directly to the Office of Legal and Regulatory Services, David Fish, the Department's Executive Director of Legal and Regulatory Services and the hearing officer in this matter, recommended that the Department proceed with the new rule without change. The [page=3062] record of the public hearing may be reviewed by contacting David Fish, Executive Director, Legal and Regulatory Services, Department of Labor and Workforce Development, P.O. Box 110, Trenton, New Jersey 08625-0110.

Summary of Public Comments and Agency Responses:

Written comments were submitted by the following individuals:

1. Belinda Cooper, Vice President, Human Resources, and Frederick J. Jacobs, Esq., General Counsel, New Jersey Hospital Association, Princeton, NJ.
2. Dominick DiRocco, Assistant Vice President, New Jersey Business and Industry Association, Princeton, NJ.
3. Bob Earl and Jack Wellman, Co-Chairs of the Legal/Legislative Committee, New Jersey Staffing Alliance, Kinnelon, NJ.
4. John J. Sarno, President, Employers Association of New Jersey, Livingston, NJ.
5. Lazlo Beh, Staff Attorney, Legal Services of New Jersey, Edison, NJ.

COMMENT: Ms. Cooper and Mr. Jacobs support the Department's proposed new rule. They state that the Federal regulation regarding "rounding," which is proposed for adoption by the Department, "provides an equitable and practical solution for both employer and employees faced with the daily issue of punctuality." They add that the Federal regulation, "accounts for the reality of employee wait time to 'punch-in' or 'punch-out' on the employer's time clock." They assert that, "an employee should not lose pay because he or she clocked in two minutes after a scheduled shift start time because the employee was waiting for other employees to 'punch-in,'" adding, "[l]ikewise, an employer should not be required to pay an employee because he or she clocked out two minutes after a scheduled shift end time because the employee was waiting for other employees to 'punch-out.'"

RESPONSE: The Department thanks the commenters for their support. However, it is important to make clear that although new N.J.A.C. 12:56-5.8 permits the practice of "rounding," the new rule, like the Federal regulation it mirrors, also requires that "rounding" be "used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." In other words, as is also stated in the new rule (adopted verbatim from the Federal regulations), "[p]resumably, this arrangement averages out, so that the employees are fully compensated for all the time they actually work." Where a particular employer uses rounding practices in such a manner that it does not, over a period of time, compensate the employees properly for all of the time that they actually worked, the Department will take the appropriate enforcement action under the New Jersey Wage and Hour Law and rules.

COMMENT: Mr. DiRocco supports the Department's proposed new rule. He firmly believes that New Jersey's rules should "explicitly permit employee time rounding in the same manner as the regulations implementing the federal (Fair Labor Standards Act) FLSA," adding, "our regulations should provide that it is permissible for an employer to round off the time that an employee works as long as the practice, over a period of time, does not inure solely to the benefit of the employer." He concludes that, "[p]roposed new rule N.J.A.C. 12:56-5.8 directly accomplishes this objective."

RESPONSE: The Department thanks the commenter for his support.

COMMENT: Mr. Earl and Mr. Wellman support the Department's proposed new rule. Specifically, they assert that the existence of a uniform State and Federal standard regarding rounding practices, "is one more step that will make New Jersey that much more attractive and acceptable to new investment by multi-state, national and even global enterprises."

RESPONSE: The Department thanks the commenters for their support.

COMMENT: Mr. Sarno supports the Department's proposed new rule. Specifically, he states that the proposed new rule, "will promote uniformity and predictability between federal and State law," adding that, "as such, it will foster greater efficiency and productivity during a time of economic distress within the State." However the commenter asks

for "clarification on the issue of what constitutes 'over a period of time' under the proposed rule when considering whether the rounding has been proper."

RESPONSE: The Department thanks the commenter for his support. As to his request for clarification, the Department's primary objective in adopting new N.J.A.C. 12:56-5.8, as was explained in the notice of proposal which appeared in the July 6, 2010 issue of the New Jersey Register, is to "enforce its requirement that employees be paid for 'all hours worked'; specifically relative to 'rounding' practices, in the same manner as the United States Department of Labor, Wage and Hour Division, enforces the analogous Federal requirement." It is for this reason that the Department is adopting the Federal regulation verbatim. The Federal regulation does not define the phrase, "over a period of time." Consequently, in the interests of uniformity between the Federal regulation and the State rule, the Department will also not be defining that phrase.

COMMENT: Mr. Beh opposes the Department's proposed new rule. He maintains that rounding is no longer necessary due to advances in time-keeping systems, adding that the Federal rounding regulation was adopted in 1961 and that "modern time keeping systems are widely available at nominal cost and maintain precise actual time worked without burden to the employer." Therefore, Mr. Beh contends that there is "little, if any, need for employers to resort to rounding practices."

Mr. Beh also asserts that the proposed new rule will benefit employers to the detriment of employees in that the rule may be interpreted "in a manner that denies workers payment for actual time worked." Specifically, Mr. Beh sets forth a scenario whereby in a given work day, where an employee's time is rounded to the maximum allowable amount (the nearest quarter of an hour) at every possible instance, and where that rounding is to the detriment of the employee on each occasion (including punching in and out for both work and lunch), the employee could "lose nearly an hour of pay each day to rounding." Mr. Beh then extrapolates this loss in hours of pay to five hours per week and 260 hours per year. Using for purposes of illustration a worker earning \$ 10.00 per hour, Mr. Beh concludes that the proposed new rule could "shortchange an employee by almost \$ 2,600 per year." Therefore, Mr. Beh suggests that the Department remove the language from the proposed new rule which would allow employers to round to the nearest quarter of an hour.

Finally, Mr. Beh recommends that if the Department does adopt the proposed new rule as written, that it also adopt a rule requiring employers to provide to each employee with each wage payment a written statement of the number of hours for which an employee is being paid.

RESPONSE: The commenter's assertion that advances in time-keeping systems have made rounding practices unnecessary is mistaken. As evidenced by the comments received from the New Jersey Hospital Association, the New Jersey Business and Industry Association, the New Jersey Staffing Association, and the Employers Association of New Jersey, summarized above, rounding practices are still in use and, therefore, a rule addressing these practices is warranted.

The commenter's stated concern that the proposed new rule could be interpreted in such a way as to shortchange an employee by up to 260 hours of pay per year ignores express language within the proposed new rule which would require that the use of rounding "average out...over a period of time," so that employees are "fully compensated for all the time they actually work." As written, the proposed new rule would not permit the use of rounding by employers in a manner which systematically, over a period of time, deprives employees of pay for time actually worked. Consequently, Mr. Beh's concern is unfounded and the change on adoption which he suggests will not be made.

Finally, as to the commenter's suggestion that an additional rule be promulgated so as to require employers to provide to each employee with each wage payment a written statement of the number of hours for which an employee is being paid, N.J.A.C. 12:56-4.1 already requires that every employer keep records for each employee of, among other things, the "total hours worked each day and each workweek," and "the basis on which wages are paid." Furthermore, N.J.A.C. 12:56-4.5 states that all such records shall be kept at the place of employment or in a central office in New

Jersey and that all such records shall be open to inspection by the Commissioner of Labor and Workforce Development. These existing rules are more than sufficient to ensure that the Department is able to effectively enforce the Wage and Hour Law and rules as is its [page=3063] responsibility. Consequently, the Department declines to make the change on adoption suggested by the commenter.

The following individuals testified at the July 29, 2010 public hearing:

1. Debra P. DiLorenzo, President and CEO, Chamber of Commerce of Southern New Jersey, Voorhees, NJ.
2. Belinda Cooper, Vice President, Human Resources, New Jersey Hospital Association, Princeton, NJ.
3. Dominick DiRocco, Assistant Vice President, New Jersey Business and Industry Association, Princeton, NJ.
4. Lazlo Beh, Staff Attorney, Legal Services of New Jersey, Edison, NJ.

COMMENT: Ms. DiLorenzo supports the Department's proposed new rule. Specifically, she states that eliminating the "differentiation between federal and State standards on this issue (that is, rounding) will not only result in businesses' ability to comply with consistent standards, but also will preserve the requirement that employees be compensated for all time worked."

RESPONSE: The Department thanks the commenter for her support.

COMMENT: Ms. Cooper supports the Department's proposed new rule.

RESPONSE: As in response to Ms. Cooper's written comments, the Department thanks the commenter for her support.

COMMENT: Mr. DiRocco supports the Department's proposed new rule.

RESPONSE: As in response to Mr. DiRocco's written comments, the Department thanks the commenter for his support.

COMMENT: The comments offered by Mr. Beh during the public hearing addressed the same concerns raised by him in his written comments, summarized above.

RESPONSE: The Department's responses to Mr. Beh are identical to the responses to his written comments. Those responses are listed above.

Federal Standards Statement

The adopted new rule would not exceed standards or requirements imposed by Federal law. Specifically, the new rule would adopt verbatim the Federal standard set forth at 29 CFR 785.48. Consequently, no Federal standard analysis is required.

Full text of the adopted new rule follows:

12:56-5.8 Use of time clocks

(a) Differences between clock records and actual hours worked. Time clocks are not required. In those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work. Their early or late clock punching may be disregarded. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged since they raise a doubt as to the accuracy of the

records of the hours actually worked.

(b) "Rounding" practices. It has been found that in some industries, particularly where time clocks are used, there has been the practice for many years of recording the employees' starting time and stopping time to the nearest 5 minutes, or to the nearest 1/10 or quarter of an hour. Presumably, this arrangement averages out, so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.