



LEXSTAT 41 N.J.R. 3779(A)

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RULE PROPOSALS

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

41 N.J.R. 3779(a)

Proposed Amendment: *N.J.A.C. 12:17-9.11*

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

Unemployment Benefit Payments; Job Abandonment

Authorized By: David J. Socolow, Commissioner, Department of Labor and Workforce Development.

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

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

Proposal Number: PRN 2009-308.

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

Friday, November 13, 2009
10:00 A.M. to 12:00 Noon
New Jersey Department of Labor and Workforce Development
John Fitch Plaza
Second Floor Large Conference Room
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 December 4, 2009 to:

David Fish, Regulatory Officer
Office of Legal and Regulatory Services
Department of Labor and Workforce Development
P.O. Box 110, 13th Floor
Trenton, New Jersey 08625-0110
Fax: (609) 292-8246

[page=3780] If you need this document in Braille, large print or audio cassette, please contact the Office of Communications at (609) 292-7832 or NJ Relay (TTY) 1-800-852-7899.

The agency proposal follows:

Summary

The proposed amendment to *N.J.A.C. 12:17-9.11* is prompted by the decision in *Espina v. Board of Review*, 402 *N.J. Super. 87 (App. Div. 2008)*, wherein the court addressed the Department's rules regarding disqualification for receipt of unemployment compensation benefits due to voluntarily leaving one's employment without good cause attributable to his or her work. Specifically, the court applied *N.J.A.C. 12:17-9.11(b)*, which concerns the situation where an employee has not returned to work following an approved leave of absence and has not notified the employer of the reasons for failing to return to work within five consecutive work days (job abandonment).

The proposed amendment is intended to clarify the position of the Department with regard to the scenario addressed by the court in *Espina*. In that case, the claimant had gone out on maternity disability leave from November 1, 2005 through January 19, 2006. At the conclusion of the maternity disability leave, the employer granted the claimant additional leave pursuant to the Federal Family and Medical Leave Act (FMLA) to care for her newborn child. The FMLA leave was from January 20, 2006 through April 13, 2006. On April 14, 2006, the claimant requested an additional week of unpaid leave, because she had been unable to obtain childcare. The employer granted claimant's request for an additional week of unpaid leave and scheduled her to return to work on April 24, 2006. On April 24, 2006, the claimant contacted the employer and requested an additional week of leave due to a continued lack of childcare. The employer advised the claimant that (1) she was now on an "unauthorized leave of absence," (2) she was expected to return to work on Wednesday, April 26, 2006, and (3) failure to return to work on that date would be considered a voluntary resignation. The claimant advised her employer that she could not report to work on April 26, 2006. The claimant did not return to work on April 26, 2006 and, on that date, the employer terminated her employment by sending a certified letter stating: "You did not return to work on Wednesday, April 26, 2006. We accept this as your voluntary resignation from your position effective immediately." On Monday, May 1, 2006, the claimant advised the employer that she had obtained childcare and asked to come back to work. However, the following day she was advised that she could not return to her position. The claimant applied for unemployment benefits and was ultimately denied those benefits, on administrative appeal, by the Appeal Tribunal and the Board of Review. Both decisions were based on the finding that the claimant had "left work voluntarily without good cause attributable to such work."

On appeal, the court found that, "Claimant's termination by the employer based upon abandonment of the position is not valid because it took effect before the expiration of the five-day period set by the regulations." The regulation to which the court is referring is *N.J.A.C. 12:17-9.11(b)*, which states that an employee who has not returned to work following an approved leave of absence pursuant to the employer's written policy, union contract or business custom and who without good cause has not notified the employer of the reasons for failing to return to work within five consecutive work days shall be considered to have abandoned his or her employment.

The court's application of *N.J.A.C. 12:17-9.11(b)* to the circumstances presented in *Espina* is problematic. Neither the Appeal Tribunal, nor the Board of Review, ever cited *N.J.A.C. 12:17-9.11(b)* in support of their respective rulings in the case. That particular rule (*N.J.A.C. 12:17-9.11(b)*) is intended to apply where an employee fails in any way to contact his or her employer and fails to return to work following an approved leave of absence. In such a case, after five consecutive work days have elapsed during which the employee has failed to contact the employer, the employee will be considered to have abandoned his or her employment and, therefore, will be subject to disqualification for unemployment compensation benefits for voluntarily leaving work without good cause attributable to such work. In *Espina*, however, the employee had, in fact, been in contact with her employer and had stated to the employer in no uncertain terms that she would not be returning to work on April 26, 2006, which date had been set by the employer and communicated to the employee following a maternity disability leave, an FMLA leave and two extensions of that leave; the first for a week and the second for two days. The proposed amendment to *N.J.A.C. 12:17-9.11* is intended to clarify that the section does not apply where an employer provides an employee with a date certain for return to work following an approved leave of absence, where on or prior to that date the employee communicates to the employer that he or she will not be returning to work on that date, and where the employee, in fact, does not return to work on that date. Under those circumstances, proposed new *N.J.A.C. 12:17-9.11(c)* would explain, the individual's eligibility for unemployment compensation should be evaluated under the remaining sections of Subchapter 9, relative to whether the individual left work voluntarily without good cause attributable to such work. Proposed new *N.J.A.C. 12:17-9.11(d)* would also state

that nothing in proposed new subsection (c) shall be altered by virtue of the employee communicating to the employer within five consecutive work days following the date certain for return to work or thereafter that he or she is no longer unable to return to work and would now like to return to work. Proposed new *N.J.A.C. 12:17-9.11(d)* would explain that under such circumstances (precisely the circumstances present in *Esrina*, as described above), the individual's eligibility for unemployment compensation would be evaluated under the remaining sections of Subchapter 9, relative to whether the individual left work voluntarily without good cause attributable to such work, and would **not** be evaluated under *N.J.A.C. 12:17-9.11* (abandonment).

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 amendment would have a positive social impact in that it would eliminate any possible confusion regarding the application of Chapter 17's job abandonment rule, which confusion might otherwise result from the court's holding in *Espina*.

Economic Impact

The proposed amendment would have a positive economic impact on both claimants and employers in that it would provide clarification with regard to the issues of job abandonment and voluntary quits, as they pertain to unemployment compensation eligibility and, thereby, it is hoped, avoid the costs for claimants and employers of unnecessary litigation, which might otherwise result from the holding in *Espina*.

Federal Standards Statement

The proposed amendment does not exceed standards or requirements imposed by Federal law. Specifically, the proposed amendment is not inconsistent with the Federal Unemployment Tax Act, 26 *U.S.C. §§3301* et seq. Consequently, no Federally standards analysis is required.

Jobs Impact

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

Agriculture Industry Impact

The proposed amendment would have no impact on the agriculture industry.

Regulatory Flexibility Statement

The proposed amendment would impose no reporting, recordkeeping or compliance requirements on small businesses, as that term is defined by the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16* et seq. The proposed amendment would simply set the record straight with regard to the meaning of *N.J.A.C. 12:17-19.11*.

Smart Growth Impact

The proposed amendment 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 amendment would not evoke a change in the average costs associated with housing. The basis for this finding is that the [page=3781] proposed amendment pertains to unemployment compensation eligibility and has nothing whatsoever to do with housing.

Smart Growth Development Impact

The proposed amendment 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 amendment pertains to unemployment compensation eligibility and has nothing whatsoever to do with hous-

ing production, either within Planning Areas 1 or 2 or within designated centers, or anywhere in the State of New Jersey.

Full text of the proposal follows (additions indicated in boldface **thus**):

SUBCHAPTER 9. CLAIM ADJUDICATION--VOLUNTARILY LEAVING WORK

12:17-9.11 Job abandonment

(a)-(b) (No change.)

(c) This section shall not apply where an employer provides an employee with a date certain for return to work following an approved leave of absence, where on or prior to that date the employee communicates to the employer that he or she will not be returning to work on that date, and where the employee, in fact, does not return to work on that date. Under the circumstances described in this subsection, the individual's eligibility for unemployment compensation shall be evaluated under the remaining sections of this subchapter, relative to whether the individual left work voluntarily without good cause attributable to such work.

(d) Nothing in (c) above shall be altered by virtue of the employee communicating to the employer within five consecutive work days following the date certain for return to work or thereafter that he or she is no longer unable to return to work and would now like to return to work. Under such circumstances, the individual's eligibility for unemployment compensation shall, as indicated in (c) above, be evaluated under the remaining sections of this subchapter, relative to whether the individual left work voluntarily without good cause attributable to such work.