



Aug 31, 2023

Categories:
[Employee Benefits](#)
[Gibbons](#)

Pay Equity Compliance Front and Center in New Jersey Department of Labor's Proposed Regulations for the Temporary Workers Bill of Rights

The New Jersey Department of Labor recently issued [proposed regulations](#) for the [Temporary Workers Bill of Rights](#) (TWBR). The proposed regulations include new definitions and further guidance for employers to comply with TWBR's pay equity requirements. The proposed regulations are open for public comment until October 20, 2023.

By way of background, the TWBR, which became fully effective on August 5, 2023, seeks to protect more than 127,000 temporary workers working in the state and employed through a temporary help service firm in designated occupations, including protective services; food preparation and serving; building and grounds cleaning and maintenance; personal service and care; construction labor, helpers, and trades; installation, maintenance, and repair; production; and transportation and material moving. The TWBR, among other things, implements detailed wage notice requirements to be provided to temporary workers in both English and the temporary worker's primary language, recordkeeping requirements, advanced notice for changes to temporary worker schedules, pay equity, and anti-retaliation rights with a rebuttable presumption for any disciplinary action taken within 90 days of a temporary worker's exercise of those rights. The goal of the TWBR is to strengthen employment protections for temporary workers in these designated occupations, and employers need to be mindful of the TWBR's requirements for compliance purposes.

The TWBR's pay equity component requires temporary workers employed in one of the above designated occupations and placed by a temporary help service firm at a third-party client to be paid the same average rate of pay, as well as the average cost of benefits, as employees of the third-party client performing the same or substantially similar work ("Comparator Employees").

While most of the proposed regulations are directed toward staffing agencies, the key proposed regulations directed toward third-party clients focus on (1) identifying Comparator Employees for purposes of setting the compensation of temporary workers, and (2) the calculation of the temporary workers' compensation.

Third-Party Clients Determine Comparator Employees

The proposed regulations define Comparator Employee as “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.”

And, although the TWBR is silent about who decides which temporary workers may perform substantially similar work, the proposed regulations make clear that “[a]t the time that the temporary help service firm contracts with the third-party client” for services of a temporary worker, it is the “third-party client [who] determines [who] would be a comparator employee.”

With that backdrop, the proposed regulations provide the following 12 “principles” for third-party clients to apply when determining whether a temporary worker is performing the same or substantially similar work to that of a potential Comparator Employee.

- Substantially similar work should be viewed as a composite of skill, effort, and responsibility performed under similar working conditions.
- Functions and duties need not be identical in order to be substantially similar.
- Occasional, trivial, or minor differences in duties that only consume a minimal amount of the employee's time will not render the work dissimilar.
- Job titles and job descriptions are relevant, but not dispositive of whether two individuals are performing substantially similar work.

- The determination should focus on an analysis of the actual job duties performed, not the specific person performing the work.
- The analysis should be applied to a full work cycle, not just a snap shot of a particular time period or day.
- Skill is measured by factors such as the experience, ability, education, and training required to perform a job.
- Effort is the amount of physical or mental exertion needed to perform a job.
- Responsibility is the degree of accountability and discretion required to perform a job.
- 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. For example, if the job to which the temporary worker 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.
- 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.
- 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.

The "substantially similar" determination will undoubtedly involve managers or supervisors from areas of the company to which the temporary workers will be assigned. As this determination will,

however, require consideration of many different factors in what is, essentially, a totality of the circumstances analysis, third-party clients with doubts about which, if any, of its employees qualify as Comparator Employees would be prudent to obtain legal advice to assist with that determination.

Third-Party Clients' Responsibilities Regarding the Calculation of Temporary Worker Compensation

Under the TWBR, another obligation of a third-party client is to provide the staffing agency, at the time it contracts with the agency, with (1) the average rate of pay, and (2) the average daily cost of benefits for the Comparator Employees, so that the agency can determine the temporary worker's hourly rate of pay. Under the proposed regulations, "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." Absent from the definition of benefits – and therefore not included in the total cost of benefits calculation – are fringe benefits an employer must provide by law to its employees, such as earned sick leave.

In addition, the proposed regulations set forth the way in which the hourly rate for salaried employees and the cost per hour of benefits are to be calculated:

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

Unfortunately, the proposed regulations do not provide any guidance about how to calculate the value of the benefits to be included. Absent such guidance, third-party clients should ensure that their benefits calculations are reasonable and supported by appropriate documentation.

Depending on the number of Comparator Employees and how often a third-party client uses temporary workers, gathering this

information for each Comparator Employee will be cumbersome and require involvement from human resources as the likely gatekeepers of this information. To that end, third-party clients who regularly engage Covered Temporary Workers may want to streamline the process. For example, third-party clients may want to create a template spreadsheet to assist them with calculating the costs of benefits to the third-party client for a Comparator Employee. Regardless of the means, third-party clients must determine efficient and reliable ways of compiling the required benefits information to provide to staffing agencies for compliance with the TWBR.

Closing Thoughts

Third-party clients should take care when conducting a similarly situated comparator analysis and calculating benefits of Comparator Employees to avoid the TWBR's penalty provisions. Each violation, per employee, of the TWBR's pay equity provision is subject to a civil penalty of up to \$5,000. Staffing agencies and third-party clients are also jointly and severally liable for any violation of the TWBR's pay equity section, as well as any relief provided under Section 11 of the TWBR, which includes the right to bring a private cause of action in New Jersey Superior Court and civil penalties determined by the Commissioner of Labor and Workforce Development.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.