

VOLUME 40, ISSUE 1

ISSUE DATE: JANUARY 7, 2008

RULE ADOPTIONS

**OTHER AGENCIES
NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY**

40 N.J.R. 195(b)

Adopted Amendments: *N.J.A.C. 19:31-10.2, 10.4, 10.5, 10.6 and 10.7*

Adopted Repeal and New Rule: *N.J.A.C. 19:31-10.11*

Authority Assistance Programs

Business Employment Incentive Program

Definitions; Amount/Term of Grant; Business Expansion or Relocation; Grant Conditions; Application Procedures; Prevailing Wages; Fees

Proposed: December 18, 2006 at *38 N.J.R. 5341(a)*.

Adopted: December 12, 2007 by the New Jersey Economic Development Authority, Caren Franzin, Chief Executive Officer.

Filed: December 13, 2007 as R.2008 d.18, **with substantive and technical changes** not requiring additional public notice and comment (see *N.J.A.C. 1:30-6.3*) **and with the proposed amendments to *N.J.A.C. 19:31-10.5 and 10.12* not adopted.**

Authority: *N.J.S.A. 34:1B-1* et seq.

Effective Date: January 7, 2008.

Expiration Date: July 22, 2010.

Summary of Public Comments and Agency Responses:

The Authority accepted comments from the following:

1. Michael G. McGuinness, Executive Director, National Association of Industrial and Office Properties.
2. Laura Gitlin, Senior Counsel, Biggins, Lacy, Shapiro & Company, LLC.
3. Arthur J. Maurice, First Vice President, New Jersey Business & Industry Association.
4. Sarah Stecker, Policy Analyst, New Jersey Policy Perspectives.
5. John Maddocks, Vice President, Economic Development, Somerset County Business Partnership.
6. Timothy R. Comerford, President - New Jersey Chapter, Corenet Global

The timely submitted comments and the Authority's responses are summarized below. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

1. COMMENT: The proposed regulations would extend the Economic Development Authority's prevailing wage and affirmative action requirements to BEIP grant recipients. It is claimed that paying prevailing wage can increase labor costs by 25 percent and it has been noted the rule proposal's Economic Impact statement suggests a 10 to 20 percent increase to the costs of construction in New Jersey. (1, 2, 3)

RESPONSE: The Authority knows of no current analysis or study that can verify the range of increase suggested, particularly on a Statewide basis as labor costs vary throughout the state's regions. A range was suggested based on the Authority's knowledge of individual projects financed by the Authority.

2. COMMENT: The commenter expresses concern that the proposal to render a BEIP grant recipient ineligible to receive any grant for the year that the total grant exceeds \$ 50,000 per new employee is over-broad and would unnecessarily and inappropriately reduce the value of the program to grantees. In the alternate, it is proposed the amendment allow for a proportional reduction in the grant award for the year as needed to stay within the \$ 50,000 cap, rather than imposing blanket ineligibility for the entire year, particularly when the lost year cannot be recovered on the back end. (2)

RESPONSE: Under the regulation as proposed, the Authority has the authority to reduce the grant proportionally to the extent the grant funds exceed \$ 50,000 per employee. In the example included in the regulations, it would be impossible to reduce proportionally, because at the outset of Year 6, before the grant amount for Year 6 is even calculated, it is clear that the amount per employee has exceeded the \$ 50,000 limit. If however the example were changed so that in Year 6 the company had 50 employees, then going into Year 6 the per employee average would be \$ 30,000. Thus, in Year 6, the business could receive a grant up to \$ 1 million (50 X \$ 20,000). If its eligible withholdings equaled \$ 1.5 million, the grant would not be forfeited; rather, it would be reduced proportionally so that it did not exceed \$ 1 million.

3. COMMENT: The commenter, in an effort to address uncertainty and inaccuracy of using jobs creation projections, suggests that the 20 percent calculation be based on the information that is already required to be submitted by the applicant/grantee at the end of the first calendar year after the expiration of the base years. (2)

RESPONSE: The Authority thanks the commentator and agrees that the use of job creation projections is unwieldy. As a result of this conclusion, the Authority has withdrawn the part of the regulation that relates to the calculation of the 20 percent cap. In a new regulation that will be promulgated in early 2008, the Authority will propose a new procedure that does not rely on projections and counts actual employees, by order of hiring.

4. COMMENT: The commenter posits that the proposed regulations would, under certain circumstances, undermine legislative intent to only impose the 20 percent cap on projects approved after July 1, 2003 and could apply retroactively to otherwise grandfathered projects. The commenter observes that such a circumstance could occur where the grantee seeks the consent of the Authority for a merger or consolidation involving job growth or the addition of a project site. (2)

RESPONSE: It is the intent of the Authority to apply the regulations prospectively. Nothing in the current regulations is intended to change substantive provisions of executed BEIP agreements. It should be noted, however, that if a BEIP recipient seeks a modification to its agreement that it is within the Authority's purview to apply new regulations to new amendments.

5. COMMENT: The commenter posits that the proposed \$ 500.00 administrative fee, the evidence required to support a mass transit bonus and the additional requirements to include nonresident New Jersey employees would discourage applicants' desires to locate in New Jersey. The suggested goal should be the reduction and simplification of reporting requirements. (2)

RESPONSE: At this time, the Authority has chosen not to adopt this proposed amendment to *N.J.A.C. 19:31-10.12* due to an ongoing review of its overall program fee structure.

6. COMMENT: It is generally averred that the proposed regulations only be applied prospectively on grounds of fundamental fairness. (2, 5)

RESPONSE: It is the intent of the Authority to apply the regulations prospectively. Nothing in the current regulations is intended to change substantive provisions of executed BEIP agreements. It should be noted, however, that if a BEIP recipient seeks a modification to its agreement that it is within the Authority's purview to apply the regulations to new amendments. Also, if a BEIP recipient executed an agreement after the 2004 statutory amendments to the BEIP

Act, the \$ 50,000 limit per employee applies and is included in its agreement. The section of the regulations that addresses the \$ 50,000 limit is intended to explain how the calculation required by the Act is done.

7. COMMENT: The commenter extends support for requiring subsidy repayment when a business' employment level drops below 50 percent of projected jobs under the BEIP agreement. Additional support is extended for using projected jobs instead of the minimum job requirements of 25 or 10, as the case may be. (4)

RESPONSE: The Authority thanks the commenter for her comments.

8. COMMENT: The commenter posits that the Authority should not create further classes of BEIP grant recipients by applying a set of rules on grantees that have 100 or more employees as it creates additional administrative burdens and adds unnecessary program complexities. (5)

RESPONSE: The Authority disagrees that the requirements places undue administrative burden on companies and created the exception to further the Authority's mission of assisting small businesses to grow in New Jersey by providing incentives to further their growth.

9. COMMENT: The commenter expresses concern with changing from a minimum eligibility threshold to a new employment commitment threshold. "The threshold for eligibility, participation and standing should be the New Jersey Legislature's stated minimum threshold." (5)

RESPONSE: The Authority uses both the minimum eligibility threshold (MET) and the new employment commitment (NEC) thresholds to administer BEIP. The MET is the entry requirement to remain in good standing under BEIP; the NEC is used to compare projected to actual employment numbers to disburse awards. Both metrics are essential to insure compliance and fiscally prudent disbursement under BEIP.

10. COMMENT: The commenter expresses concern as to the gauging of an applicant's job creation performance over the course of only one year as it is inappropriate in the face of the cyclical nature of business. In addition, unforeseen occurrences can also affect an applicant's performance such as was experienced post 9/11. It is suggested that EDA evaluate an applicant's performance averaged over a term longer than just one year. (5)

RESPONSE: The Authority evaluates job creation performance over two years to ensure that unforeseen circumstances do not negatively impact a recipient's ability to lose its eligibility under BEIP.

11. COMMENT: The commenters express concern about the proposed \$ 50,000 per new employee cap as it serves as a disincentive to the creation of high paying jobs. Furthermore, in years when the \$ 50,000 per employee limitation is exceeded, then the grant should be paid at its maximum level as opposed to being suspended. (5, 6)

RESPONSE: The EDA disagrees with the comment; the cap does not discourage high paying jobs, but limits unlimited growth in awards under the program to ensure fiscal prudence under BEIP.

12. COMMENT: The commenters express concern that the proposed Mass Transit Scoring Bonus regulations will place an undue burden on employers and seeks to convert the BEIP program into a transportation management program. The commenters suggest, instead, a BEIP scoring bonus for an employer's proximity to mass transit resources. (5, 6)

RESPONSE: The Authority proposed the amendment to ensure that by providing bonuses to achieve the goal of increased mass transit, usage was accurately verified, recognizing that the location of a facility in proximity to a transit hub did not necessarily mean that employees are actually utilizing mass transit.

13. COMMENT: The commenters express support for consideration of a business's location in an Innovation Zone and further suggests expansion of Innovation Zone designations. (5, 6)

RESPONSE: The Authority thanks the commenters for their comments.

14. COMMENT: The commenters express support for the proposed changes regarding business expansion or relocation. (5, 6)

RESPONSE: The Authority thanks the commenters for their comments.

15. COMMENT: The commenters express support for the proposed changes regarding additional grant conditions. (5, 6)

RESPONSE: The Authority thanks the commenters for their comments.

16. COMMENT: The commenters express disagreement with the change in application procedures requiring information on an employer's provision of a transportation fringe for reasons cited in opposition to the Mass Transit Scoring Bonus. (5, 6)

RESPONSE: See the Response to Comment 12 above.

17. COMMENT: The commenters express concern with the proposed prevailing wage and affirmative action changes, citing the placement of considerable burdens on smaller businesses absent any support or benefit. The commenters further express support for neutrality on a company building, leasing or purchasing a facility. (5, 6)

RESPONSE: Prevailing wage and affirmative action requirements are increasingly mandatory on all New Jersey State-supported programs, as initiated and approved by the New Jersey Legislature and the Authority has taken this step to be consistent with State policy in this regard.

18. COMMENT: The commenters express opposition to application or commitment letter fees and suggest the NJEDA examine solutions to the "slow rate of response received from companies" before implementation of a commitment letter fee. (5, 6)

RESPONSE: See the Response to Comment 5 above.

Summary of Agency-Initiated Change:

The Authority has determined not to adopt the proposed regulation at *N.J.A.C. 19:31-10.4(e)3* relating to the methodology for computing the 20 percent cap of the grant because it has reviewed the effectiveness of that provision and has determined that a different methodology will be simpler to administer and easier for applicants. The Authority anticipates proposing amended rules regarding this methodology in early 2008. As a result of this decision, the definition for "annualized salary" in *N.J.A.C. 19:31-10.2* and proposed amendments to *N.J.A.C. 19:31-10.4(e)3* and 10.5(c) and (d) will not be adopted. The Authority has determined not to adopt the proposed change to *N.J.A.C. 19:31-10.12(c)* because it is re-examining its fee structure.

Federal Standards Statement

The adopted amendments, repeal and new rule are not subject to any Federal standards or requirements; therefore, a Federal standards analysis is not required.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

SUBCHAPTER 10. BUSINESS EMPLOYMENT INCENTIVE PROGRAM

19:31-10.2 Definitions

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

...

["Annualized salary" shall mean for those new employees who have not worked an entire calendar year, the amount of salary the new employee would receive if he or she worked for the entire calendar year, assuming his or her salary remains constant. To the extent the new employee had received bonuses or stock options in the years prior to the report, annualized salary will include the average of any bonus or stock option received by the new employee during the two calendar years prior to the report.]

...

"Consumer Price Index" means the consumer price index developed by the United States Bureau of Labor Statistics for Urban Wage Earners and Clerical Workers using the Metropolitan Statistical Area (MSA) by county as developed by the United States Census Bureau in its most recent census. The MSA by county for New Jersey divides the State into

northern and southern areas. If the project is located in an area designated as a northern county, the northern index shall be used and if the project location is in an area designated as a southern county, the southern index shall be used.

...

"Effective date" means the date of approval of the grant by the Authority's governing board.

"New employment commitment" shall mean the number of new employees projected at the time of application or if this projected number has not been reached by the end of the base years, the number of employees actually hired at the end of the base years but in no case shall it exceed the number of new employees which the business has represented at application that it will employ and maintain during and throughout the commitment duration. ***New employment commitment shall also have the meanings set forth in N.J.A.C. 19:31-10.5(c) and (d).***

...

"Non-resident New Jersey employee" means a new employee who lives outside New Jersey and who is not subject to any withholding tax under the laws of the State of New Jersey, such that the withholding for such employee must be computed pursuant to *N.J.A.C. 18:35-7.8* as the hypothetical amount of withholding that would occur if the employee were to move to New Jersey.

...

19:31-10.4 Amount/term of grant

(a) The amount of the business employment incentive grant in each case shall be not less than 10 percent and not more than 50 percent of the withholdings of the eligible positions for new employees or not less than 10 percent and not more than 30 percent of the estimated tax of a partner of an eligible partnership whether paid directly by the partner or by the eligible partnership on behalf of such partner's account, or any combination thereof. In no case shall the aggregate amount of the employment incentive grant awarded pursuant to a business employment incentive agreement entered into on or after July 1, 2003 exceed an average of \$ 50,000 per new employee for all new employees over the term of the grant. The average for all new employees over the term of the grant shall be determined based on annual reports submitted by the applicant, certifying the number of new employees.

1. The Authority will review the certified reports annually to determine whether the applicant has reached or exceeded the \$ 50,000 per new employee limit. To the extent that the applicant has received grant funds in excess of \$ 50,000 per new employee, the Authority will reduce the grant proportionally.

EXAMPLE: Company A receives a grant in the aggregate amount of \$ 1,500,000 for calendar years 1 through 5. The Company certifies that it has 2,000 full-time new employees as of December 31 of Year 5. In Year 6, Company A reduces its workforce, such that it has only 25 full-time new employees as of December 31 of that year. Subsequently, in Year 7, Company A hires new employees and certifies that, as of December 31 of Year 7, it has 1,000 employees.

Based on these facts, in Year 5 of the grant term, the Authority concludes that Company A's aggregate grant amount does not exceed the \$ 50,000 per new employee limitation, because the aggregate annual amount for each new employee equals \$ 750.00 ($\$ 1,500,000/2,000 = \$ 750.00$). However, in Year 6 of the term, the Authority concludes that the company is not eligible for the grant, because the company's per new employee average exceeds the maximum \$ 50,000 in that year ($\$ 1,500,000/25 = \$ 60,000$). In Year 7, the Authority concludes that Company A is again eligible for a grant, because the per employee amount does not exceed \$ 50,000 ($\$ 1,500,000/1,000 = \$ 1,500$).

The failure of Company A to qualify for a grant in Year 6 will not extend the term of the grant.

(b) (No change.)

(c) The following criteria shall be considered when determining the grant amount and term that a business will be eligible to receive:

1.-14. (No change.)

15. Whether 10 percent of the employees of the business receive a "qualified transportation fringe" in a minimum amount of \$ 30.00 pursuant to Title 26 of the *United States Internal Revenue Code Section 132(f)(1)(a)* for transportation in a commuter highway vehicle if such transportation is in connection with travel between the employee's residence and place of employment or Section 132(f)(1)(b) for any transit pass, as such commuter highway vehicle and transit pass are defined in *Section 132(f) of the Internal Revenue Code*;

16.-17. (No change.)

18. Whether the business is located within five miles of and is working cooperatively with a public or non-profit university on research and development;

19. Whether the business is within a designated industry and is located within a New Jersey Economic Development Authority Innovation Zone; and

20. (No change in text.)

(d) (No change.)

(e) Payment of a grant shall be subject to a certified copy of the business's prior year's payroll categorized by employees not subject to the grant and new employees subject to the grant. The certification shall identify the number of employees and partners in each category, the salary of each employee, the estimated tax paid by each partner in the foundation year, the date of hire, and withholding taxes paid for each employee.

1. (No change.)

2. In the event the business creates in excess of the new employee commitment, the business may be eligible to receive an adjustment in its grant to include the lesser of the dollar amount equal to the amount of withholdings paid for the additional eligible positions above the new employment commitment multiplied by the grant award percentage; or a dollar amount which shall be a 20 percent cap above the dollar amount of the withholdings attributed to the new employment commitment adjusted annually by the Consumer Price Index, with the exception of the following which, in the discretion of the Authority, may receive the full dollar amount of withholdings paid for the additional eligible positions multiplied by the grant award percentage:

i.-iii. (No change.)

*[3. The 20 percent cap shall be calculated as follows:

i. Within 30 days of the earlier of reaching the new employment commitment or the end of the base years, the business shall submit a report indicating the name, social security number, position, annualized salary, deductions and projected withholdings for each employee included in the new employee commitment. The new employees that comprise the new employee commitment will be determined by date of hire starting with the earliest hire date to the most recent;

ii. Based on the information contained in the report, the Authority will calculate the aggregate projected annual withholdings for the employees comprising the new employee commitment. This number shall constitute the base withholdings upon which the 20 percent cap will be calculated;

iii. Twenty percent of the withholdings calculated in (e)3ii above shall be added to such base withholdings; and

iv. The number obtained through the calculation in (e)3iii above shall be adjusted annually by the Consumer Price Index as defined in *N.J.A.C. 19:31-10.2*.]*

*[4.]**3.* (No change in text.)

(f) A business that is receiving any other grant by operation of State law is limited to a Business Employment Incentive Grant which annual value when combined with the other grants cannot exceed 80 percent of the business's withholdings or 50 percent of the estimated tax of partners of an eligible partnership, except upon the written approval of the State Treasurer. Amounts received as grants from the Office of Customized Training pursuant to *N.J.S.A. 34:15D-1* et seq. shall be excluded from the calculation.

(g) A business that qualifies under *N.J.S.A. 34:1B-129b* for a grant of up to 80 percent of its withholdings or up to 50 percent of its estimated tax that is receiving any other grant by operation of State law is limited to a Business Employment Incentive Grant which annual value when combined with the other grants cannot exceed 80 percent of the business's withholdings or 50 percent of the estimated tax of partners of an eligible partnership; except upon the written approval of the State Treasurer. Amounts received as grants from the Office of Customized Training pursuant to *N.J.S.A. 34:150-1* et seq. shall be excluded from the calculation.

(h) (No change in text.)

19:31-10.5 Business expansion or relocation

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

(c) If a business is expanding through a merger or consolidation with one or more companies, only the eligible positions created or transferred from outside New Jersey after board approval and the official date of the merger or consolidation shall be considered when determining a grant. *[The Authority's approval of the merger or consolidation will be conditioned on the growth of the number of new employees under the grant being subject to *N.J.A.C. 19:31-10.4(e)2*].

(d) To the extent a business requests to add an additional site to an existing BEIP, Authority's approval of the new site will be conditioned on the growth of the number of new employees under the grant being subject to *N.J.A.C. 19:31-10.4(e)2*. The additional site will be required to meet or to have met the material factor test, unless the additional site is directly related to growth at the original project site.]*

19:31-10.6 Grant conditions

(a)-(h) (No change.)

(i) As a condition of its continuation in the grant program no later than March 1 of each year, for the preceding grant year, every business which is awarded a grant from the Business Employment Incentive Program shall submit to the Authority, on a form provided by the Authority:

1. (No change.)

2. A certification form containing one section for new employees in eligible positions whose income is not subject to New Jersey gross income tax pursuant to *N.J.S.A. 54A:1-1* et seq. and one section for all other new employees in eligible positions and indicating:

i.-ii. (No change.)

iii. The total amount of new employees in eligible positions who were terminated in the grant year;

iv. (No change.)

v. A copy of the NJ-W-3, annual reconciliation of tax withheld for the grant year; and

vi. With respect to all non-resident New Jersey employees, on a form provided by the Authority, a list of all such employees, with a computation of the hypothetical withholding tax in the amount that would be attributable to each such employee, calculated pursuant to the New Jersey Gross Income Tax Act, *N.J.S.A. 54A:1-1* et seq. as if the non-resident

New Jersey employees are subject to New Jersey gross income tax. The computation of withholding under this subparagraph shall be based on income as reported on each non-resident employee's Federal Form W-2, Wage and Tax Statement and in accordance with the instructions and methods prescribed by the current employer instruction booklet (Form NJ-WT). The approved method for computing withholdings for single employees shall be pursuant to the Taxation Division Director's table, in effect at the time of calculation, for Percentage Method of Withholding, "Rate A," weekly payroll period. The approved method for computing withholdings for married persons or heads of household shall be pursuant to the Taxation Division Director's table, in effect at the time of calculation, for Percentage Method of Withholding, "Rate B," weekly payroll period. Each applicant business must submit copies of the Federal Form W-2 with the list required by this subsection for each non-resident New Jersey employee identified on the list;

3.-6. (No change.)

(j) (No change.)

19:31-10.7 Application procedures

(a) A business shall apply to the Authority for a grant on a form prescribed by the Authority which requires the following:

1.-14. (No change.)

15. Whether 10 percent of the employees of the business receive a "qualified transportation fringe" in a minimum amount of \$ 30.00 pursuant to Title 26 of the *United States Internal Revenue Code Section 132(f)(1)(a)* for transportation in a commuter highway vehicle if such transportation is in connection with travel between the employee's residence and place of employment or Section 132(f)(1)(b) for any transit pass, as such commuter highway vehicle and transit pass are defined in *Section 132(f) of the Internal Revenue Code*;

16.-19. (No change.)

20. For publicly traded businesses, a copy of the businesses' form 10K; and

21. Any additional information deemed necessary to evaluate a specific application including, but not limited to, the certified annual statement required by *N.J.A.C. 19:31-10.4(a)*, and the type and form of records required to be submitted to the Director pursuant to *N.J.A.C. 18:35-7.1* through *7.8*, as amended from time to time by the Director pursuant to *N.J.S.A. 34:1B-137*.

(b)-(d) (No change.)

19:31-10.11 Prevailing wage and affirmative action

To the extent a business (and not an unaffiliated third party) undertakes the construction of the project within two years of the business' execution of a commitment letter for the grant, the business shall comply with the Authority's prevailing wage requirements, N.J.A.C. 19:30-4, and affirmative action requirements, N.J.A.C. 19:30-5, in the performance of the construction contract.

19:31-10.12 Fees

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

[(c) A nonrefundable commitment letter fee of \$ 500.00 shall be assessed against the applicant upon issuing the commitment letter.]

Recodify proposed (d)-(f) as ***(c)-(e)*** (No change in text.)