



**NJSA**  
NEW JERSEY STAFFING ALLIANCE

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**Suggestions for Consideration in NJDOLWD's and NJDCA's Development of Forms, Posters, Rules, and Regulations for A-1474**

**BACKGROUND**

As NJDOLWD and NJDCA staff draft forms, notices, rules, and regulations associated with A-1474 which was signed into law by Governor Murphy on February 6, 2023, NJSA wishes to contribute its comments and suggestions in order for the bill to be fully implementable, compliant by all parties, and specific enough to minimize any ambiguities and debates in enforcement or legal review.

As the business association in New Jersey that has represented the temporary staffing industry for decades, NJSA represents an expert and legitimate resource on the operation of the staffing industry. NJSA's input will ensure the forms, posters, rules and regulations will be optimized for implementation, administration, and enforcement by NJDOLWD and NJDCA.

NJSA's suggestions and commentary will not modify the spirit and intent of the new law. These comments are intended to address the reality that the law, like many other laws, may be clear in its objectives but not necessarily clear and appropriate on how to achieve them in the actual environment/situation. Legislators are understandably not staffing industry experts, so this outcome is understandable and one NJSA is sure NJDOLWD and NJDCA have had to address in the past. It is NJSA's hope that our suggestions and availability for future discussions and input during the drafting process will be welcomed and invited.

**SUGGESTIONS AND/OR COMMENTARY**

The following suggestions and/or commentary are being offered using section numbers in the order of highest to lower importance from the perspective of the staffing industry. NJSA has attempted to be clear in its comments, but if there are any ambiguities or questions, please do not hesitate in contacting NJSA.

**Section 7.b.**

Focus: "Any temporary worker assigned to work at a third party client in a designated classification placement shall not be paid less than the average rate of pay and average cost of benefits, or the cash equivalent thereof, of employees of the third party client performing the same or substantially similar work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions for the third party client at the time the temporary laborer is assigned to work at the third party client."

Commentary: This sentence was one of the most discussed, confusing sections of the new law. Therefore, it is the first topic on which NJSA wishes to offer commentary and ultimately suggestions.

**Pay and benefit comparability based on length of service:** The vast majority of temporary laborers in New Jersey perform assignments that average 10 weeks of length<sup>1</sup>. There is a huge majority of individuals who work assignments of shorter length and a smaller number whose assignments are longer (and most of these are professional **temporary** staff rather than the occupational categories listed as designated classification placements).

There is a much smaller number of temporary laborers who remain at one client location for an extended period of time, and those individuals are sometimes called “permatemps” in the press. It is critical to understand that these extended assignments happen for two reasons:

- The client wishes to retain these individuals based on performance, personality and/or other factors but management may not have the authorization to offer full time employment to the individuals (current industry practice is to not have placement fees after this long an assignment, so staffing firms are not impacting these client hire decisions) and
- These individuals have freely chosen to remain on the extended assignments for numerous personal reasons: transportation is available, working conditions, appreciation by the client, enjoying the rest of the work team and/or client supervisor, satisfaction with the staffing firm’s benefits and employee services, lack of interest or even motivation to explore other temporary assignments at other clients, among many others reasons.

As a result, long term assignments are often a mutual decision by both the individuals and clients to continue the assignment for months, if not years. With long term assignments both the staffing firm and client generally will agree to issue pay rate increases periodically to these temporary laborers to encourage retention of this temporary laborer.

Regarding the subject of “performing same or substantially similar work”, Senator Cryan, this law’s primary Senate sponsor, recently added a specific benchmark that needs to be added to the metrics used to establish equivalency as required in this law. In his television interview three months ago<sup>2</sup> Senator Cryan said the bill would require the temporary worker to be paid the same average pay plus benefits of a client employee with the same length of time in the job, in his example one year. To arrive at this understanding, the Senator’s clear intention and belief are that “same or substantially similar work” must include also a length of service measurement as well.

Using Senator Joseph P. Cryan’s own stated position – i.e., including length of service in the role equivalence definition – adds an important and justifiable measurement to paying comparable compensation to the temporary laborer in the same job. It also provides a pathway for the final regulations to establish a clear and appropriate criterion for clients to follow when determining the “average rate of pay and average cost of benefits, or the cash equivalent thereof” for each job title in their organization where they would use temporary laborers in a designated classification placement.

**Recommendation:** because temporary employees work highly variable lengths of time, it would be impractical and burdensome to require temporary help service firms to continually reassess pay rates based on small incremental periods of time. Monitoring and enforcing such changes would pose an impossible compliance and enforcement burden. Accordingly, we recommend that the rules allow determination of pay and benefits comparability to be made for two broad categories of temporary employees based on their length of service as described below.

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<sup>1</sup> <https://d2m21dzi54s7kp.cloudfront.net/wp-content/uploads/2020/05/2021-StateFactSheets-NJ.pdf>

<sup>2</sup> [Sen. Joseph Cryan on temp workers bill future, New Jersey’s top headlines | Reporters Roundtable - YouTube](#) Especially after the 6:45 minute mark

**Short-term employees:** Since temporary laborers initially assigned to a client have no prior experience at that client's location and no knowledge of the duties they are going to be asked to perform, they are essentially equivalent to a client's own "new hires" for that job title. The client's direct hire employee will generally work at the client's hiring pay level until an annual review, promotion, or a major pay rate change within the company occurs. At the same time, the vast majority of temporary laborers will have a length of assignment/service with the client of only days, weeks, and perhaps several months. Only a small percentage will remain on the assignment past six months.

Based on the reality experienced by the vast majority of temporary laborers, NJSA recommends that the regulations specify that paying the temporary worker at least "the client's average pay rate for a new hire in the same job title/category plus the cash equivalent on an hourly basis of the average value of benefits provided to the client's employees during the initial six month of service (using 1040 hours)" will meet the requirements of the law for both the temporary staffing firm and the client. For clarity, "benefits provided to the client's employees" is recommended to be defined as "benefits that are paid in full/only or accrued by the client such as PTO, holiday pay, sick pay, pension payments, etc. that would apply to all employees with this length of service, and would not include any voluntary benefit plans as well as benefit plans whose costs are shared by the client's employee and client."

**Longer-term employees:** If NJDOLWD and NJDCA would like to insure some comparability in the client's pay and benefits at a specific length of assignment beyond the initial six month period for calibration purposes – such as at two to three years of service (or any other length deemed to be appropriate), then a second measure can be provided by the client that provides the temporary staffing firm with "the client's average pay rate for a client employee with between twenty-four and thirty-six months of service in the same job title/category plus the cash equivalent on an hourly basis of the average value of benefits provided to the client's employees during the subsequent twelve months of service (using 2080 hours)." The temporary staffing firm would then have to make sure it is paying its temporary employee at least this measurement once the assignment has passed this second benchmark.

In view of the limited number of temporary laborers affected and the previous comments regarding permatemps, a second calibration point may be appropriate but additional ones beyond this second calibration point or between these measures would be an exercise that brings little value to the temporary laborers and an unreasonable administrative responsibility to clients of the staffing industry. With only two well-defined measures, there is the added advantage of making oversight and enforcement by NJDOLWD and NJDCA much easier.

NJSA recommends that the regulations require clients to reevaluate their pay rates plus the cash equivalent on an hourly basis of the average value of benefits for each benchmark provided to temporary help service firms (a) at least once every twelve months or (b) whenever a client salary/hourly pay program and/or benefit program changes. Clients must communicate these new values to temporary help service firms within 30 days of their effective date and temporary help service firms must adjust affected temporary laborers as of the first work day in a pay period within 15 days of receiving the client notice.

**Criteria for determining comparability:** Regulations should provide specific guidance for determining whether work is the "same or substantially similar" to the work performed by client employees. To enable temporary services firms to make such determinations, the rules should provide specific criteria for assessing whether the temporary job requires "equal skill, effort, and responsibility" as the job being performed by the client's employee and whether the job is "performed under similar working conditions." Such determinations are inherently subjective, but other states with "equal pay" laws have endeavored to specify in rules and other guidance the factors that will be considered relevant in making such determinations.

**Recommendation:** New Jersey regulations should specify the factors that will be used to determine whether a job is the same or substantially similar and factors that would allow pay and benefit differentials based on differing working conditions. For example, guidance adopted under the Oregon Equal Pay Act provides that an employer can pay employees differently for work of comparable character if the difference is based on any combination of bona fide factors based on seniority, merit, quantity or quality of production, workplace location, travel, education, training, and experience and whether the work is performed on weekends, holidays, and at what time of day. Oregon also specifies the criteria for making the threshold determination of whether work is of “comparable character.” For example, criteria based on “skill” include attributes like “ability,” “agility,” “coordination,” “creativity,” “efficiency,” “experience,” and “precision.” See Oregon [FAQs for employers](#) and [OAR 839-008-0010](#)

## **Section 7.a.(1)**

**Focus:** “A temporary help service firm may charge a placement fee to a third party client ... not to exceed the equivalent of the daily commission rate the temporary help service firm would have received over a 60-day period, reduced by the equivalent of the daily commission rate the temporary help service firm would have received for each day the temporary laborer has performed work for the temporary help service firm in the preceding 12 months.”

**Commentary:** There are numerous terms in this section’s language that are undefined and actually do not reflect the reality that exists in the temporary staffing industry. NJSA would like to offer a quick overview regarding placement fees that currently exists and how they are calculated. Afterwards NJSA will offer some recommendations on definitions and how the calculation could be defined in the regulations that would be easy to administer and enforce.

**Industry Practice:** Currently placement fees are essentially a fee to compensate the staffing firm for the loss of gross margin dollars<sup>3</sup> (the difference between the bill rate and the temporary laborer’s wage plus employer taxes, mandated benefits paid by the staffing firm, and workers compensation insurance expense) as a result of the client’s hiring the temporary laborer directly from the assignment prior to when the contract with the client would allow.

Industry practice is that clients would pay placement fees if a low-skilled temporary laborer is hired before either 520 hours or 1,040 hours (based on either 3 months or six months of 40-hour work weeks) depending on the contract, or up to 2,080 hours (i.e., 12 months) for a highly skilled or hard to recruit temporary laborer like a fork truck driver. The placement fee generally declines as the hours billed to the client increases until the placement fee no longer applies.

Last, each assignment is a new hire event for the staffing firm and the temporary laborer, so the hours of work applicable to the placement fee is singularly measured on only the current assignment’s hours and not any previous employment of the same temporary worker with the staffing firm on other assignments.

Historically the placement fee has been based on a percentage of the annual salary offered by the client to the temporary laborer in a manner similar to employment agencies or in some cases, based on volume of business, etc., a stated dollar amount as negotiated by the parties.

**Recommendations:** Trying to work with the language of the section and utilizing suggested definitions for the terms used in the law, NJSA believes its recommendations will be easy to implement, calculate,

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<sup>3</sup> Essentially the placement fee is intended to compensate the staffing firm for its significant unamortized expense in recruiting, locating, screening, hiring, assigning, and reassigning the temporary laborer to clients.

and justify with minimal interpretation by the various parties (clients, staffing firms and temporary laborers in designated classification placements).

“Daily commission rate” is recommended to be defined as the temporary laborer’s regular hourly pay rate on the current assignment with the client who will be billed a placement fee times 8 hours (a standard work day) times a Gross Margin Factor of 40% [see the attached Exhibit for the (a) basis of this suggested factor and (b) examples on how NJSA’s recommendation would work].

NJSA further recommends a new term in the regulations and its definition: “hourly commission rate” which is defined as the “daily commission rate” divided by 8 hours.

“Over a 60 day period” is too vague and variable in terms of hours per day worked, etc. to be equitable to all parties. NJSA recommends that the “over a 60 day period” be defined in the regulations as either

- 480 hours which is 60 days (the equivalent of 12 weeks of 5-day work weeks) of working 8 hours per day OR
- 360 hours which is 45 days (9 is the closest whole week number for 60 calendar days [60 divided by 7 is 8.57] times 5-day work weeks) of working 8 hours per day.

NJSA suggests that, in line with these recommended definitions, the following portion of the section be redefined in the regulations for purposes of ease of administration, transparency, and enforcement.

- As written: “Reduced by the equivalent of the daily commission rate the temporary help service firm would have received for each day the temporary laborer has performed work for the temporary help service firm in the preceding 12 months.”
- Recommended with new language underlined: “Reduced by the equivalent of the hourly commission rate based on the current assignment’s hourly pay rate the temporary help service firm would have received for each billable hour (defined as regular and overtime hours billed to any client) the temporary laborer has performed work for the temporary help service firm in the preceding 12 months.”

## **Section 7.a.(2)**

Focus: In this subsection there is a phrase that is not defined: “... the total compensation cost for the temporary laborer, including costs of any benefits provided.”

Commentary: Presumably “total compensation cost” is the sum of billable hourly wages (regular and overtime) plus the “costs of any benefits provided.” Without an implementable definition of these terms, NJSA would be especially concerned since failure to supply this information correctly is a violation. NJSA asks that the definition be drafted so that the temporary help service firm will have an administratively simple method to be compliant with the regulations. In addition to having a definition of “total compensation cost,” there are two aspects of second term (“costs of any benefits provided”) that are concerning to NJSA:

- The definition of “benefits provided” needs to be developed and
- How the cost of “benefits provided” are included in “total compensation costs.”

Recommendations: NJSA recommends the following regarding these terms:

- “Total compensation cost” is defined as the sum of billable hourly wages (regular and overtime) paid plus the “costs of any benefits provided” that are paid in this pay period.
- The definition of “benefits provided” would follow the same general recommendation NJSA offered for Section 7.b. but modified to address the temporary help service firm instead of the client: “benefits that are paid in full/only by the temporary help service firm such as PTO,

holiday pay, sick pay, pension payments, etc. and would not include any voluntary benefit plans or benefits plans whose costs are shared by the temporary laborer and temporary help service firm.”

- Determining the “costs of any benefits provided” is recommended to be defined as “the sum of any payments associated with the benefit programs as defined above that are actually issued in the wage payment for which the wage payment and notice form relate.” For instance, if a temporary laborer is paid for holiday pay in a pay period, then the holiday pay would be “benefits provided” in that pay period and would be added to billable hourly wages to equal “total compensation cost.”

### **Section 7.g.**

Recommendation: Temporary laborers are not always being picked up by transportation services at the point of hire (i.e., the temporary help service firm’s branch location). Frequently the pickup point is at a location that is more convenient to the temporary laborers. NJSA recommends that the last sentence of this section in the regulations provide a definition of “point of hire” to mean in this section the following: “where the temporary laborer was picked up prior to the work day, which could be the point of hire.”

### **Section 3.a.**

Recommendation: Candidates and temporary help service firm’ staff communicate via email, text or telephone each other to be assigned that day, in addition to being in person in the branch. In keeping with the methods of communication allowed for other notices and forms mentioned in this section and others, NJSA recommends the underlined language be added: temporary help service firms be specifically allowed to transmit in writing or electronic means a confirmation that a temporary laborer sought work and that an electronic confirmation does not require a signature by a representative of the firm.

### **Section 4.c.(2)**

Recommendation: NJSA recommends that the bill highlight areas which are solely the responsibility of the client by adding to the first sentence the underlined addition “....to provide time records in accordance with subsection b, the information required to be provided by the client in subsection a.(2), as well as change in work schedules or change in work locations in order to support the temporary help service firm in performing its responsibilities in Section 3 shall not be a violation...”

### **Section 6.b.**

This section includes a requirement for the temporary help service firm to provide an annual earnings summary, which is undefined in the law. NJSA recommends that the current practice of the temporary help service firms issuing an annual W-2 fulfills this obligation. The temporary laborer will have in their possession (or can request copies of) all of the wage payment and notice forms providing all the details supporting the summary of wages paid in the calendar year.

### **Section 6.c.**

Recommendation: Statements made during the discussion of this law indicate that the sponsors intent for this subsection was to provide temporary laborers in designated classification placements who are specifically working for temporary help service firms who pay wages daily the ability to request payments be made bi-weekly. This was to minimize the frequency of having them pay frequent check cashing fees. NJSA wants to ensure that temporary help service firms paying wages daily are the only category of temporary help service firms subject to this subsection. A large majority of NJ staffing firms

pay their employees weekly and NJSA expects this law and its regulations will not prevent them from continuing this practice.

### **Section 10.a.**

Recommendation: In some ways the language of this subsection reflects the legislator’s familiarity with full time employment and not temporary employment. Temporary employment by nature of its industry practice has a start and scheduled end date of employment driven by the project or business needs of the client. For this reason, NJSA requests that the second sentence of this subsection be interpreted, if possible, in the regulations to include the underlined language: “The termination or disciplinary action, other than the scheduled end of the temporary laborer’s assignment, by a temporary help service firm against a temporary laborer in a designated classification placement within 90 days of the person’s exercise of rights protected under....”

### **ENDING COMMENTS**

In view of the significant and time-consuming effort to develop and implement new systems, procedures, staff and client training, collection of the necessary client information for notices, and record retention systems, NJSA recommends that the final regulations stipulate a reasonable period (in excess of 90 days) for implementation following the date of final regulation publication, especially regarding Sections 3 and 10. Obviously final regulations will be a key prerequisite for systems and training development.

It is hoped that this list of suggestions and recommendations will be the start of a dialogue. NJSA welcomes questions, inquiries, or discussions of any kind during your drafting process.

EXHIBIT

**Determining a Factor to Multiple Against Hourly Pay to Arrive at an Hourly Commission Rate**

To base this recommendation on actual information, NJSA used the financial results of True Blue, Inc., the largest public staffing company with a targeted market focus of most of the law’s larger designated classification placement categories. Its 2021 Annual Report<sup>4</sup> reported the firm earned 25.8% gross margin on its revenues. Using a bill rate of \$40, standard employer burden rates for taxes and unemployment and short-term disability trust payments, workers compensation insurance, and benefits, plus True Blue, Inc.’s gross margin %, the following chart indicates that the pay rate would be \$25.81 per hour and gross margin is 40% of the pay rate. Hence the recommended factor would be 40%.

		\$ per Hour	% of Billing
Billing to the Client		40.00	100.00%
Temporary Labor Costs and Expenses			
	Pay Rate	25.81	64.52%
	Employer Taxes	2.06	5.16%
	Workers Comp and benefits	1.81	4.52%
	Subtotal	29.68	74.20%
Gross Margin		10.32	25.80%
	<b>Gross Margin as a % of Pay Rate=</b>	<b>40%</b>	

Examples of the recommended placement fee calculation:

Case 1: The temporary employee has worked with a temporary help service firm a total of 225 billable hours for several clients over the past 12 months, including the hours with the current client. The employee’s current pay rate is \$20.00. The client wants to have the temporary employee work directly for it.

Case 2: The temporary employee has worked with a temporary help service firm a total of 80 billable hours over the past 12 months, and all of those hours are with the current client. The employee’s current pay rate is \$20.00. The client wants to have the temporary employee work directly for it.

	Case 1		Case 2	
Over 60 days definition (Hours) - 2 options per case	480	360	480	360
Actual Hours Billed with staffing firm	225	225	80	80
Balance of hours remaining	255	135	400	280
Employee Pay Rate	\$ 20.00	\$ 20.00	\$ 20.00	\$ 20.00
Gross Margin Factor	40%	40%	40%	40%
Hourly Commission Rate (Pay Rate times Factor)	\$ 8.00	\$ 8.00	\$ 8.00	\$ 8.00
<b>Placement fee (Hourly Commission Rate times Balance of Hours Remaining)</b>	<b>\$2,040.00</b>	<b>\$1,080.00</b>	<b>\$3,200.00</b>	<b>\$2,240.00</b>

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