ASSEMBLY, No. 173

STATE OF NEW JERSEY

219th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2020 SESSION

Sponsored by:
Assemblyman HAROLD "HAL" J. WIRTHS
District 24 (Morris, Sussex and Warren)
Assemblywoman CAROL A. MURPHY
District 7 (Burlington)
Assemblyman PARKER SPACE
District 24 (Morris, Sussex and Warren)

Co-Sponsored by:
Assemblymen DePhillips and Webber

SYNOPSIS

Expands scope of New Jersey Regulatory Flexibility Act dealing with economic impact of rules on small businesses.

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel.

AN ACT expanding components of administrative rule-making that deal with impact of rule on small businesses and amending and supplementing P.L.1986, c.169 (C.52:14B-16 et seq.).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 2 of P.L.1986, c.169 (C.52:14B-17) is amended to read as follows:

2. As used in this act, "small business" means any business , including its affiliates, which is resident in this State, independently owned and operated and not dominant in its field, and which employs fewer than 100 full-time employees or has gross annual sales of less than $6 million.

(cf: P.L.1986, c.169, s.2)

2. Section 3 of P.L.1986, c.169 (C.52:14B-18) is amended to read as follows:

3. In developing and proposing a rule for adoption, the agency involved shall utilize approaches which will accomplish the objectives of applicable statutes while minimizing any adverse economic impact of the proposed rule on small businesses of different types and of differing sizes. Consistent with the objectives of applicable statutes, the agency shall utilize such approaches as:

a. The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small businesses;

b. The consolidation or simplification of compliance or reporting requirements for small businesses so long as the public health, safety, or general welfare is not endangered;

c. The use of performance rather than design standards; and

[c.**]** d. An exemption from coverage by the rule, or by any part thereof, for small businesses so long as the public health, safety, or general welfare is not endangered.

(cf: P.L.1986, c.169, s.3)

3. (New section) The Legislature finds and declares that:

a. A vibrant and growing small business sector is critical to creating jobs in a dynamic economy. However, small businesses bear a disproportionate share of regulatory costs and burdens.

Uniform regulatory and reporting requirements can impose unnecessary and disproportionately burdensome demands, including legal, accounting, and consulting costs, upon small businesses with limited resources. The failure to recognize differences in the scale and resources of regulated businesses can adversely affect

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

competition in the marketplace, discourage innovation, and restrict improvements in productivity. Unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes.

The practice of treating all regulated businesses as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental, and economic welfare legislation.

b. The regulatory and enforcement culture of State agencies can be more responsive to small business without compromising the statutory missions of the agencies. When adopting rules to protect the health, safety, and economic welfare of New Jersey, State agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on small employers. Alternative regulatory approaches which do not conflict with the stated objective of applicable statutes may be available to minimize the significant economic impact of rules on small businesses.

c. Therefore, the process by which State rules are developed and adopted should require agencies to solicit the ideas and comments of small businesses, to examine the impact of proposed and existing rules on such businesses, and to review the continued need for existing rules. Judicial review for compliance should be available for small businesses.

4. (New section) An agency seeking to continue in effect an expiring rule by duly proposing for re-adoption the rule, with an amendment, prior to its expiration pursuant to section 10 of P.L.2001, c.5 (C.52:14B-5.1), shall consider, as part of the regulatory flexibility analysis, the following factors to ensure that any adverse economic impact of the rule on small businesses is minimized in a manner consistent with the objectives of the applicable statutes:

a. The continued need for the rule;

b. The nature of complaints or comments received from the public concerning the rule;

c. The complexity of the rule;

d. The extent to which the rule overlaps, duplicates, or conflicts with other federal and State rules; and

e. The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

The agency's consideration of, and findings regarding, these factors shall be described in the regulatory flexibility analysis issued on the proposed rule pursuant to section 4 of P.L.1986, c.169 (C.52:14B-19).

In all other cases, the agency shall conduct and complete a regulatory flexibility analysis and consider the additional factors set forth in the section by the end of each seven year period following the effective date of a rule. The agency's consideration of, and findings regarding, these factors as well as the regulatory analysis shall be filed in writing for the record with the New Jersey Business Action Center within the Department of State.

5. (New section) a. A small business that is adversely affected economically or aggrieved by final rule-making action may object to all or a part of a rule subject to regulatory flexibility analysis by filing a petition with the agency within 90 days after the date of final rule-making action. For the purpose of this subsection, "date of final rule-making action" includes the date of adoption of a rule or of an amendment to a rule, or of readoption of a rule due to expiration, or of the end of a seven year period following the effective date of a rule, whichever is applicable.

A petition filed pursuant to this subsection shall be based on the following grounds:

(1) the agency failed to prepare a regulatory flexibility analysis; or

(2) the regulatory flexibility analysis issued failed to contain or consider a matter or factor required by law or contained a clear error or omission of a material fact which directly resulted in the agency's failure to consider, or the agency's underestimation of, an adverse economic impact.

The petition shall include a detailed and comprehensive explanation of the grounds.

After receiving a petition, an agency shall determine whether the petition has merit and respond to the petitioner within 45 days after the petition is filed. If the agency finds that the petition is without merit, it shall state the finding and explain the basis for that finding in writing. If the agency finds that the petition has merit, the agency shall state the finding and explain the basis for that finding in writing, and shall take such action as the agency deems necessary to ensure compliance with P.L.1986, c.169 (C.52:14B-16 et seq.), including, if appropriate, to amend the rule to which the small business objected.

b. If an agency determines that the petition filed under subsection a. of this section has no merit or an agency fails to take action it deemed necessary on a petition that the agency determined had merit, the small business that is adversely affected economically or aggrieved by final rule-making action may seek judicial review by the Appellate Division of the Superior Court of agency compliance with the requirements of P.L.1986, c.169 (C.52:14B-16 et seq.) on the same grounds as set forth in its petition.

A small business may seek such review during the period beginning on the date the agency renders a determination that the petition filed under subsection a. of this section has no merit and ending 90 days later.

The agency may cause the requested review to be dismissed upon a filing with the court of a motion for summary disposition accompanied by an affidavit setting forth, with particularity, the facts that demonstrate that the grounds for the request for review by the small business fail to show in a clear and definitive way that the small business would prevail on the plenary review. The small business shall have the right to challenge such a motion by submitting an affidavit that contradicts the assertions of the agency's affidavit. The court may render a ruling on the motion for the summary disposition based solely on the affidavits submitted.

In granting any relief in an action instituted pursuant to this section, the court shall order the agency to take corrective action consistent with P.L.1986, c.169, including, but not limited to, remanding the rule to the agency, and deferring the enforcement of the rule only against small businesses unless the court finds that continued enforcement of the rule is in the public interest.

If the court finds that the grounds set forth by a small business in the request for the judicial review are false, inaccurate, trivial, frivolous or vexatious, the court shall impose appropriate sanctions including, but not limited to, an order to pay to the agency the amount of the reasonable expenses incurred as a result of the agency's response to the request for review including reasonable attorneys fees.

Nothing in this section shall be construed to limit the authority of any court to review agency action which review is available, or provided for, by any other law; or to stay the effective date of any rule or provision thereof under any other provision of law. Compliance by an agency with P.L.1986, c.169 shall be subject to judicial review only in accordance with this section.

6. This act shall take effect on the first day of the sixth month following enactment.

STATEMENT

This bill makes changes to the “New Jersey Regulatory Flexibility Act” in order to expand the scope of the law with regard to small businesses, defined as businesses that employ fewer than 100 full-time employees or having gross annual sales of less than $6 million.

The bill requires an agency to use, when developing rules, the consolidation or simplification of a compliance or reporting requirement for small businesses as an approach to minimize the

rule's impact on small businesses, so long as the public health, safety, or general public welfare is not endangered.

Under the bill, an agency seeking to continue in effect an expiring rule by duly proposing for re-adoption the rule, with amendment, prior to its expiration, is to consider a series of factors, as part of the regulatory flexibility analysis, which are set forth in the bill. This review is to be conducted by the agency at the time a rule is proposed for re-adoption (which is generally every seven years), to ensure that the rule continues to have a minimal impact on small businesses.

The bill establishes a process by which a small business that is adversely affected economically or aggrieved by final rule-making action may file a petition with the agency objecting to all or a part of a rule subject to regulatory flexibility analysis. For cases in which the agency rejects the petition, this process addresses concerns about frivolous appeals without creating unprecedented procedures with respect to the courts. Specifically, the bill: (1) establishes a petition process as a prerequisite for a court appeal; (2) requires the appeal petition to be filed within 90 days after final rule-making action; (3) creates an optional summary disposition process based on affidavits; (4) sets sanctions for frivolous appeals; and (5) places a restriction on appeals based on compliance with the regulatory flexibility process.