



RESPONSE TO PUBLIC COMMENTS ON CHAPTER 19 RULES GOVERNING APPRENTICESHIP IN ENERGY FACILITY CONSTRUCTION

Maine Department of Labor Bureau of Labor
Standards

December, 2021

On July 21, the Chapter 19 Rules Governing Apprenticeship in Energy Facility Construction draft was advertised, and the public comment period began, originally ending August 23, 2021. At the request of several interested parties, the comment date was extended to September 13, and additional responses were received in the interim. In all, comments were received from seven sources. They were:

1. Eileen Miazga, Maine Apprenticeship Program, Augusta
2. Jeff Saliba, Heat and Frost Insulators Local 6, Boston, MA
3. Peter Diplock, Maine Bureau of Rehabilitation Services, Augusta
4. Matt Marks, AGC Maine and Jeremy Payne, Maine Renewable Energy Association, Augusta
5. A. Robert Ruesch, Verrill Dana LLP, Portland
6. Cynthia Phinney, Maine AFL-CIO, Augusta
7. Jason J. Shedlock, Laborers' New England Region

The following is a summary of the comments, with the commenter(s) and relevant rules section(s) in parentheses, and the Bureau's responses. Comments are grouped by subject matter and the common response follows.

Section I: Application

Comment (7, Rules § I): "Further clarification is needed in the term "engaged." These rules should apply to any employer who employs or contracts for employment; including a developer, contractor or subcontractor."

Comment (5, II.G.): "The inclusion of 'developer' in this definition is not consistent with industry practices, is vague and will create confusion. ...no developer can be said to have an insignificant measure of control over the construction of a generation facility. ... developers should be omitted from this definition." "What represents 'a significant measure of control' needs more precision."

Comment (7, II.G.): Suggests amending definition of "Person Constructing a Generation Facility" to clarify who is meant to be included.

Comment (6,II.G.): "...clarify which employers are covered by the apprenticeship requirements." "The proposed rules' test regarding control may leave some employers unsure of whether they are subject to the apprenticeship percentages, even if they are responsible for hiring workers under the statute's definition."

Response: Upon reflection on these comments, the Department agrees that the word "developer" in this subsection could cause confusion and will replace that word with the phrase "other entity". The department believes that the phrase "significant measure of control" is sufficiently precise to be understood as intended within the context. (Rule changed to clarify.)

Section II: Definitions

Comment (2, II.A.): "...the definition of "qualified apprentice" is unnecessarily broad, and could be read as meaning being involved in any apprenticeship program recognized by the US DOL, even if that program has no connection to the work being performed."

Response: This is a helpful clarification and will be added to the definition of Qualified Apprentice as follows (new language in *italics*):
Qualified Apprentice means a person in an apprentice program recognized by the United States Department of Labor or by the Maine Department of Labor *and directly related to the work being performed.* (Rule changed to clarify as suggested.)

Comment (4, II.A.): "...this definition... should include pre-apprentices."

Response: A pre-apprentice is not an apprentice. The statute defines "Apprentice" by reference and clearly specifies that "apprentices" must be employed in numbers that equal certain required percentages. To avoid any confusion, the Department may include this clarification in an FAQ or similar documents.

Comment (4, II.C.): It appears that the definition of "Available" to mean "either otherwise not fully employed or willing to consider an offer of employment" would exclude an employer from offering an apprenticeship to "a current employee who might be interested in a career change to advance their skills or interest."

Comment (5, II.C.): Terms in the definition of "available" are "too vague, at odds with existing law, and do not reflect the real-world pace of construction." Suggests definition conflicts with the nature of existing apprenticeship programs.

Comment (7, II.C.): "'Available' and 'Fully Employed' needs to be further defined, as oftentimes construction workers are temporarily employed but willing and able to accept longer term employment if and when available depending on the timing of employment."

Response: An employee who is willing to consider an offer of a different position with the same employer falls within the definition of "available." The Rule allows an employer to offer an apprenticeship to a current employee who wants a career change to advance their skills and interest and such an apprenticeship would count toward the apprenticeship requirements set forth in 26 M.R.S. § 3502(1).

Comment (5; II.C & E; IV; V): Objects generally to references in the Rule to “phases” of construction not otherwise defined.

Comment (4, IV): What will determine “each phase”?

Response: Section IV, B. states that a construction employer must submit a plan to the bureau prior to starting the construction project *or* prior to starting each phase of the construction project. Section II. H. of the rule states that a phase may include an employer’s established pay period. Therefore, a construction employer could submit a single plan prior to start of their portion of the project or they could submit a plan prior to the start of each pay cycle while that construction employer is working on site.

Comment (4, II.G.): It is not clear whether the developer, designer or engineer defined in Section II.G. as the “person constructing a generation facility” is required to adhere to the law.

Response: Any person, such as a general contractor, subcontractor, or developer, (or other entity) who has a significant measure of control over the construction of a generation facility is required to adhere to the law. If the apprenticeship requirements are not met, it is possible that more than one person may be liable for such violation. (Note that the Department will change “developer” to “other entity” in Rules section II.G..)

Comment (3, III.A.i.): “...Section III A. i lacks clarity as to its intent and requirements regarding persons with disabilities and an employer’s obligation in claiming that sufficient numbers of qualified apprentices were not available.” References language in 29 CFR Part 30 – Equal Employment Opportunity in Apprenticeship, §30.7 Utilization goals for individuals with disabilities, suggests including citation and explanation of same within Rule, provides sample language to that effect.

Response: We appreciate the suggestion and may include the sample language provided in webpage, FAQs or other documents offering compliance assistance on the subject.

Comment (5, III.A.): “The Proposed Rules should make clear whether the phrase ‘with a presence in Maine’ applies to just ‘employers,’ or whether it applies to ‘labor unions’ as well. To the extent employers and labor unions are geographically based in or connected to Maine, there should also be a geographic reference in the Proposed Rules as to where the available apprentices should be found.”

Response: The Department intends to include both employers and labor unions with a presence in Maine.

Comment (4, IV): How will the Rule be applied to projects in various stages of the design, permitting and construction phase?

Response: The rule applies to each phase, as set forth in Section II. C and G, and Section IV of the Rule.

Section III: Availability of Apprentices

Comment (6, III.A.): Suggests adding language requiring employer to find and employ qualified apprentices “for each phase of the project.”

Response: This cannot be required because it is not a requirement of the statute, which requires a percentage of “all persons employed in the construction” to be apprentices.

Comment (6, III.A.): Suggests altering this section of the Rule by striking out several words and replacing them with underlined language as follows: “This shall include evidence of having contacted the Maine Apprenticeship Program, sponsors of apprenticeship training programs including labor organizations and employers with a presence in Maine, or other appropriate sources.”

Comment (7, III.A.): Suggests replacing “may” with “shall” and “such as” with “including” (similar to changes suggested by Maine AFL-CIO, above).

Response: This sentence was intended to offer employers various methods of demonstrating efforts to find and employ apprentices rather than to prescribe any particular method or methods.

Comment (4, IV.C.): “In section C, it mandates an interim report with the completion of each phase. Is that determined through a payment requisition and payment, or another benchmark?”

Response: Since section II. H. states that a phase may include the employer’s established pay period, the construction employer would submit a report at the end of each pay cycle that the construction employer has employees working on site.

Comment (4, IV.D.): How will MDOL define completion? What time will be allowed following the completion for a final report?

Response: Typically, a project would be considered complete when the construction employer no longer has employees working on the site. For enforcement purposes, the Bureau would allow the construction employer up to four weeks after the employer no longer has employees working on the site to provide the final report.

Comment (4, IV): What entity has the burden of meeting the overall percentages?

Response: Each construction employer working on the construction project is required to meet the percentage threshold. If the total percentage includes a fraction or a whole number and a fraction, then the amount will be rounded to the nearest whole number.

Comment (4, IV): Are owner/operators and Independent Contractors included in the percentage calculation?

Response: No. Owner/operators and bona fide independent contractors are not considered construction employers if they do not have employees working for them on site.

Comment (4,III): Does the apprenticeship requirement apply to the percentage of the aggregate number of workers on the worksite or of each subcontractor's workforce?

Response: The percentage requirement is measured by the all "persons employed in the construction" in accordance with the legislative language at 26 M.R.S. § 3502.A.B. and C. Section II.H. of the Rule clarifies that "persons employed in the construction" means all persons employed in an apprenticeable occupation (not the entire workforce) during any phase or time period (which may include an employer's established time period) of the operation, during the entire duration of the operation, or during some combination of these periods of time.

Comment (5, V, B, ii and iii): “The requirement ... for payroll records to be maintained on site or within 10 miles of the site is unnecessary and is at odds with how business is done.”

Response: Keeping the records within 10 miles of the site is not a requirement, but rather an example of what is acceptable. Construction employers will be in compliance with this section as long as the records are available to a representative of the Bureau at any reasonable hour, in accordance with 26 MRS §622, regardless of where the records are kept. The language referring to “*within 10 miles*” will be removed. (Rule change to avoid confusion).

Comment (6, IV, B and C): Create a standard Employment Hiring Plan form.

Response: The bureau will consider the possibility of creating a standard reporting form for the convenience of the employer and bureau. This will not require a rule change. Thank you for the suggestion.

Section V: Enforcement

Comment (1, V.B. ii): “Every apprentice registered in Maine receives a unique RAPIDS identification number, if you think that may be helpful in record keeping.”

Response: We appreciate the suggestion and will include that information in the webpage or FAQ document offering compliance assistance on the subject.

Comment (6, V): The Bureau should require employers to submit the payroll data detailed in section V in an electronic format at regular intervals.

Response: 26 MRS §622 requires employers to keep true and accurate records and that those records must be accessible to any representative of the department at any reasonable hour. The records can be in paper or electronic format. It is not necessary to put this burden on either the employer or the Department. There will be no change to the rule on this issue.

Comment (4, V, B, iii): “It isn’t clear if this applies to all employees or the records of apprentices.”

Response: This section applies to all employees of each construction employer (i.e., contractor and sub-contractor, etc.). The records required to be kept by this section need not be in paper form. They may be in an electronic format.

Comment (4, V.C): Each day of violation should not be a separate penalty.

Comment (6, V.C.): “We support that the proposed rule states that ‘Each day a sufficient number of apprentices are not employed in accordance with the law and these rules is a separate violation.’”

Response: This is consistent with BLS’s *Rules Governing Administrative Civil Money Penalties for Labor Law Violations*, 12 170 Chapter 9, Section II.C., which is a major substantive rule that provides procedural guidance regarding assessment of administrative civil penalties for violations under other statutory provisions enforced by the Bureau. The Department appreciates support for this section.

Comment (7, V): It should be made clear that providing false information regarding an individual’s status as an apprentice is subject to a penalty.

Response: This would require a statutory change. A rule cannot assert a penalty if not specifically authorized in statute.

Comment (6): Recommends that the “Bureau or Maine Apprenticeship Program make a public list of available registered apprenticeship programs that developers could access when planning for a project.”

Response: The Department intends to include information on its webpage or FAQ document offering a comprehensive list of registered apprenticeship programs in Maine.

Comment: (7, V) The rules should clearly outline that each employer, for each phase, that does not comply with the statute is in violation and subject to the appropriate penalties.

Response: The statute sets forth, in 26 MRS §§ 3501(2) and 3502(3), that a “person constructing a generation facility” is subject to the law. Section II.G. of the Rule defines and clarifies that phrase.

Comment (7, 26 MRS section 3501.1):

“ ‘In an apprentice program’ should be further defined that the apprentice’s enrollment status shall be verifiable with the Maine or US Department of Labor. For example, just because an apprenticeship program is registered with one of these entities, doesn't mean that the worker is a qualified apprentice and enrolled in a program.”

Response: The Department may choose to rely on the “RAPIDS ID” identification number issued to every apprentice registered with either Maine or the United States Department of Labor in order to verify enrollment in a registered program.