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RULE PROPOSALS

**LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF WAGE AND HOUR COMPLIANCE**

43 N.J.R. 3075(a)

Proposed Amendment: *N.J.A.C. 12:56-7.2*

[Click here to view Interested Persons Statement](#)

Exemption from Overtime for Bona Fide Administrative Employees; Restoration of "Inside Sales Exemption"

Authorized By: Harold J. Wirths, Commissioner, Department of Labor and Workforce Development.

Authority: *N.J.S.A. 34:1-20*.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2011-245.

A **public hearing** on the proposed amendment will be held on the following date at the following location:

Tuesday, December 13, 2011
10:00 A.M. to 12:00 Noon
New Jersey Department of Labor and Workforce Development
John Fitch Plaza
2nd Floor Large Conference Room
Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 292-2789 if you wish to be included on the list of speakers.

Submit written comments by January 20, 2012 to:

David Fish, Regulatory Officer
Office of Legal and Regulatory Services
New Jersey Department of Labor and Workforce Development
P.O. Box 110 - 13th Floor
Trenton, New Jersey 08625-0110
Fax to: (609) 292-8246

The agency proposal follows:

Summary

It was an unintended consequence of the Department's recent repeal of New Jersey rules regarding exemptions from overtime requirements for individuals employed in bona fide executive, administrative, professional, or outside sales capacities and replacement of those New Jersey rules with the adoption by reference of 29 CFR Part 541 (See 43 *N.J.R.* 725(a); 2352(a)), that the Department eliminated the New Jersey-specific regulatory overtime exemption for employees whose primary duty consists of sales activity and who receive at least 50 percent of compensation from commissions and total compensation of not less than \$ 400.00 per week. This exemption is often referred to as the New Jersey "inside sales exemption." It had been located at *N.J.A.C. 12:56-7.2(b)*, recently repealed, and had been based on the Department's characterization of the subject employees as "administrative," thereby making them exempt from overtime requirements under New Jersey's overtime law, *N.J.S.A. 34:11-56a4*. Again, the elimination of the "inside sales exemption" was an unintended consequence of the Department's recent rulemaking activity, a consequence that the Department intends to reverse through the rule amendment proposed herein.

An amendment is also proposed to the section heading of *N.J.A.C. 12:56-7.2*, changing "exceptions" to "exemptions" to accurately reflect the nature of the subchapter.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements pursuant to *N.J.A.C. 1:30-3.3(a)5*.

Social Impact

The proposed amendment would reverse an error made by the Department and restore an exemption from overtime requirements that has existed in New Jersey for many years and upon which both employers and employees have come to rely. Correcting this error, the Department believes, would have a positive social impact upon all residents of New Jersey.

Economic Impact

The proposed amendment would have a positive economic impact in that it would restore to New Jersey a longstanding exemption from overtime requirements that had inadvertently and unintentionally been eliminated by the Department as the result of a recent related rulemaking. It would be in the best interests of no one if the Department were to allow this error to go uncorrected.

Federal Standards Statement

The New Jersey "inside sales exemption" has a Federal analogue in what is commonly referred to as the "Section 7(i) exemption." The Section 7(i) exemption refers to Section 7(i) of the Federal Fair Labor Standards Act (FLSA), which states that no employer shall be deemed to have violated subsection (a) of Section 7 of the FLSA by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly wage rate applicable to him under Section 7 of the FLSA, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. The New Jersey overtime law, *N.J.S.A. 34:11-56a4*, contains no such exemption, which is presumably the reason that the Department originally chose to incorporate into its rules the concept embodied by the Section 7(i) exemption through inclusion of its own "inside sales exemption" as part of the "administrative" exemption.

It is in large part because the New Jersey overtime law and Federal FLSA differ in this respect that rather than adopt by reference the Federal regulations regarding employees of retail or service establishments (29 CFR Part 779), the Department is proposing to amend *N.J.A.C. 12:56-7.2* so as to simply return to the rules regarding exemptions from overtime for bona fide executive, administrative, professional, and outside sales employees former *N.J.A.C. 12:56-7.2(b)*, which established an exemption for certain inside sales employees as a part of the "administrative" exemption, and which embodied the essence of the Federal Section 7(i) exemption, while remaining within the constraints of the New Jersey overtime law, *N.J.S.A. 34:11-56a4*. Thus, the proposed amendment differs from, but does not exceed Federal standards or requirements and no Federal standards analysis is required.

Jobs Impact

The proposed amendment would have no impact on either the generation or loss of jobs.

Agriculture Industry Impact

The proposed amendment would have no impact on the agriculture industry.

Regulatory Flexibility Statement

The proposed amendment would impose no reporting, recordkeeping, or compliance requirements on small businesses, as that term is defined within the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16* et seq. Rather, as to both small and large businesses, the proposed amendment would provide needed clarification regarding the Department's enforcement of the overtime pay requirements.

Housing Affordability Impact

The proposed amendment would not evoke a change in the average costs associated with housing. The basis for this finding is that the proposed amendment pertains to enforcement of the State's overtime law and rules and has nothing to do with housing.

Smart Growth Development Impact

The proposed amendment would not evoke a change in the housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed amendment pertains to enforcement of the State's overtime law and rules and has nothing to do with housing production, either within Planning Areas 1 or 2, within designated centers, or anywhere in the State of New Jersey.

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

[page=3076] SUBCHAPTER 7. EXEMPTIONS FROM OVERTIME

12:56-7.2 Defining and delimiting the [exceptions] **exemptions** from overtime for executive, administrative, professional, and outside sales employees

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

(c) **"Administrative" shall also include an employee whose primary duty consists of sales activity and who receives at least 50 percent of his or her total compensation from commissions and a total compensation of not less than \$ 400.00 per week.**