



LEXSTAT 43 NJR 725(A)

NEW JERSEY REGISTER

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VOLUME 43, ISSUE 06

ISSUE DATE: MARCH 21, 2011

RULE PROPOSALS

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

43 N.J.R. 725(a)

Proposed Amendment: *N.J.A.C. 12:56-6.1*

Proposed Repeals and New Rules: *N.J.A.C. 12:56-7*

Click here to view Interested Persons Statement

Exemptions from Overtime for Bona Fide Executive, Administrative, Professional and Outside Sales Employees

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 2011-075.

A **public hearing** on the proposed amendment, new rules and repeals will be held on the following date at the following location:

Friday, April 15, 2011
10:00 A.M. to 12:00 Noon
New Jersey Department of Labor and Workforce Development
John Fitch Plaza
13th Floor Auditorium
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 May 20, 2011 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

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The agency proposal follows:

Summary

The Department is proposing to repeal its existing rules regarding exemptions from overtime for bona fide executive, administrative, professional and outside sales employees and replace them with the analogous Federal overtime exemption regulations. The Department would accomplish this primarily by repealing existing N.J.A.C. 12:56-7, Exemptions from Overtime, and adding new N.J.A.C. 12:56-7.2, which would adopt by reference 29 CFR Part 541. The Department would also be relocating the substance of existing N.J.A.C. 12:56-7.6, Employees exempt from overtime, which is proposed for repeal, to new N.J.A.C. 12:56-7.1. The only change from the rule proposed for repeal to the relocated new rule would be stylistic.

As noted by the court in *Marx v. Friendly Ice Cream Corporation*, 380 N.J. Super. 302 (App. Div. 2005), existing N.J.A.C. 12:56-7 was modeled on and informed by the Federal overtime exemption regulations that were in effect prior to August 23, 2004. On August 23, 2004, the United States Department of Labor substantially revised the Federal overtime exemption regulations; however, New Jersey has not to date made the necessary amendments to its rules, so as to ensure consistency with the Federal regulations. This inconsistency between the State overtime exemption rules for bona fide executive, administrative, professional and outside sales employees and the analogous Federal overtime exemption regulations, although permissible under Federal and State law, is not mandated by either. These inconsistencies have caused considerable confusion and consternation within the regulated community and there does not appear to be any meaningful purpose served by allowing them to persist. Therefore, the Department intends to eliminate the differences between these State rules and Federal regulations, as mentioned above, through an adoption by reference of the Federal regulations, an action which the Department believes to be long overdue.

The one exception to the proposed wholesale adoption by reference of 29 CFR Part 541 is reflected in proposed new N.J.A.C. 12:56-7.2(b), which would indicate that the Department is not adopting those provisions within the Federal regulations that relate solely to individuals employed by government employers, since government employers are excluded from coverage under the New Jersey overtime law. See N.J.S.A. 34:11-56a1 ("employer" includes any individual, partnership, association, corporation or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee); See also, *Allen v. Fauver*, 167 N.J. 69 (2001).

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, repeals and new rules would have a positive social impact in that they would eliminate any possible confusion regarding the Department's enforcement policy relative to the statutory exemption from the overtime premium pay requirement for bona fide executive, administrative, professional and outside sales employees. Specifically, with the Department's adoption by reference of 29 CFR Part 541, the regulated community would be assured that where their practices relative to exemption from overtime for bona fide executive, administrative, professional and outside sales employees conform to appropriate Federal law and regulations, those practices also comply with the appropriate State law and rules. This straight forward and simple approach would be of assistance not only to the regulated community, but also to the Department in its enforcement efforts.

Economic Impact

The proposed amendment, repeals and new rules would have a positive economic impact on employers in that having a better understanding of the Department's enforcement policy should help them avoid running afoul of the State overtime law and rules, thereby incurring fewer administrative penalties. The proposed amendment, repeals and new rules may have a negative economic impact on employees who will seek to recover overtime premium pay against em-

employers under the New Jersey overtime law and rules in that the simplified post-2004 Federal overtime exemption regulations that would be adopted by reference contain short tests, which impose fewer requirements on employers to establish exemptions. Nevertheless, as indicated in the Summary above, the Department believes that the Federal regulations and State rules should be consistent and is unaware of any compelling reason to permit the differing standards to persist.

Federal Standards Statement

The proposed amendment, repeals and new rules would not exceed standards or requirements imposed by Federal law. Specifically, the proposed amendment, repeals and new rules would adopt by reference the Federal standards set forth at 29 CFR Part 541. Consequently, no Federal standards analysis is required.

Jobs Impact

The proposed amendment, repeals and new rules would have no impact on either the generation or loss of jobs.

Agriculture Industry Impact

The proposed amendment, repeals and new rules would have no impact on the agriculture industry.

Regulatory Flexibility Statement

The proposed amendment, repeals and new rules 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, repeals and new rules would provide needed clarification regarding the Department's enforcement of the overtime pay requirements.

Smart Growth Impact

The proposed amendment, repeals and new rules would not have an impact on the achievement of smart growth or the implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact

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

Smart Growth Development Impact

The proposed amendment, repeals and new rules 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, new rules and repeals pertain 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 rules proposed for repeal may be found at N.J.A.C. 12:56-7.

Full text of the proposed amendment and new rules follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 6. OVERTIME

12:56-6.1 Rate of overtime payment

For each hour of working time in excess of 40 hours in any week, except as provided in *N.J.A.C. 12:56-[7.6]7.1*, every employer shall pay to each of his or her employees, wages at a rate of not less than 1 1/2 times such employee's regular hourly wage.

SUBCHAPTER 7. EXEMPTIONS FROM OVERTIME

12:56-7.1 Employees exempt from overtime

Any individual employed in a bona fide executive, administrative, professional or outside sales capacity shall be exempt from the overtime requirements of *N.J.A.C. 12:56-6.1*.

[page=727] **12:56-7.2 Defining and delimiting the exceptions from overtime for executive, administrative, professional and outside sales employees**

(a) Except as set forth in (b) below, the provisions of 29 CFR Part 541 are adopted herein by reference.

(b) Not adopted by reference are those provisions within 29 CFR Part 541 that apply solely to those individuals employed by government employers, including, but not limited to, those individuals employed by State, county and municipal employers, since the definition of the term "employer" within *N.J.S.A. 34:11-56a1* does not include government employers. See *N.J.S.A. 34:11-56a1* ("employer" includes any individual, partnership, association, corporation or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee); See also, *Allen v. Fauver*, 167 N.J. 69 (2001).