

**TO:** AGK  
**FROM:** BMP  
**RE:** New Jersey's new Overtime Regulations  
**DATE:** April 6, 2011

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With its proposed amendments to New Jersey's overtime regulations, the New Jersey Department of Labor is proposing to repeal certain overtime exemptions to bring its overtime regulations in line with the analogous federal overtime scheme. Essentially, New Jersey is replacing its existing overtime regulations with the federal regulatory scheme. New Jersey will repeal existing N.J.A.C 12:56-7 and replace it with N.J.A.C. 12:56-7.2, which adopts by reference the federal overtime exemption scheme encoded in 29 C.F.R. § 541. These regulations define four categories of employees: "Executive", "Administrative", "Professional", and "Outside Sales" who are exempted from New Jersey's wage law requirements that employees be paid overtime. New Jersey is making the change, because of the confusion caused by the inconsistency between state and federal regulatory schemes.

It seems clear that New Jersey will substantially expand the scope of the exceptions to overtime requirements in its minimum wage law. Employers will have to pay overtime to less employees following adoption of the new language. The federal criteria, granting exceptions to overtime pay are fewer in number and worded more generally.<sup>1</sup> For instance, New Jersey requires an "Executive", who does not receive overtime, to meet six conditions. N.J.A.C. 12:56-7.1. The federal law requires an

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<sup>1</sup> The federal definition of the "Outside Sales Person" is an exception. The federal definition encoded in 29 C.F.R. § 541.5 is largely similar to the New Jersey definition and thus should not substantially change the exemption's application.

“Executive” to meet only four conditions. 29 C.F.R. § 541.100. This memo analyzes such differences between the federal scheme and the state scheme it will replace.

Additionally, the statutory change should expand the scope of workers exempt from overtime pay requirements beyond even what the statutory language would suggest. This is so, because New Jersey courts have to this point recognized that New Jersey’s policy is to require overtime payments to more workers than federal law would require. Marx v. Friendly Ice Cream Corporation, 380 N.J. Super. 302 (App.Div.2005). By adopting the federal exemptions, New Jersey is giving up that policy and accepting broader application of the overtime exemptions.

The federal overtime scheme that will replace New Jersey’s existing overtime regulations provides for complete exemption from overtime pay requirements for any employee working in a bona fide executive, administrative, outside sales or professional capacity. 29 C.F.R. § 541. The exemption depends, not on occupational titles or job classifications, but rather on whether the individual employee's duties and salary meet the regulatory requirements. To determine if an employee fits within these categories and is thus exempt from overtime pay requirements, the federal code requires examination of the employee’s job duties, supervisory responsibilities and compensation.

**The Executive Exemption:**

By adopting the federal definition for “Executive” employees exempt from overtime requirements, New Jersey will substantially broaden the scope of the exemption. As is illustrated in the below comparison, New Jersey’s current definition has six conditions that all must be met concurrently to exempt an employee from overtime pay. The federal law that New Jersey intends to adopt features only four

criteria. Additionally, the general wording in the federal criteria promises to broaden the scope of their application in New Jersey.

N.J.A.C. 12:56-7.1 exempts from overtime regulations, an “Executive” employee, which means any employee: (1) whose primary duty consists of management of the enterprise in which he or she is employed or of a department or subdivision thereof; and (2) who customarily directs the work of two or more other employees; and (3) who has the authority to hire or fire other employees, or whose recommendations as to hiring and firing are given particular weight; and (4) who customarily exercises discretionary powers; and (5) who devotes less than 20 percent of his or her workweek to non-exempt, non-executive work, or less than 40 percent if employed in retail or service; and (6) who is compensated on a salary basis, exclusive of gratuities, board, lodging or other facilities at more than \$400 per week. Additionally, the “Executive” exemption includes employees owning equity in their employer of more than 20 percent but not employees training to become executives who do not actually perform the above duties.

29 C.F.R. § 541.100 applies the “executive” exemption to an employee: (1) that is compensated on a salary basis at a rate equal to or above \$455 a week; whose primary duty is management<sup>2</sup> of the enterprise in question or of a recognized department; (3) who customarily and regularly directs the work of two or more employees; and (4) possessing

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<sup>2</sup> Section 541.102 contains a non-exhaustive list illustrating the type of activities constituting “management,” including:

activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

29 C.F.R. § 541.102.

the authority to hire or fire other employees or whose suggestions or recommendations are given particular weight relative to such employment decisions.

The federal scheme has applied the “executive” exemption to: managers of ready-mix-concrete plants who hire and manage plant employees, schedule staff work hours and recommend terminations, DOL Opinion Letter 2008 WL 1847287; Livestock Field Inspectors who oversee livestock inspections within predetermined geographic districts and who hire and train new employees, DOL Opinion Letter 2007 WL 4190763; a superintendent of a construction company that oversees the work of subcontractors, DOL Opinion Letter 2007 WL 506576; a store manager who manages many employees but not two working at the same time, DOL Opinion Letter 2006 WL 3227790; police lieutenants, captains and fire battalion chiefs, DOL Opinion Letter 2005 WL 3308611.

The federal scheme has found that the “executive” exemption does not apply to: an airline pilot, unless the pilot has significant input into hiring and firing of crew, DOL Opinion Letter 2009 WL 648998; store assistant managers who are closely supervised and earn little more than non-exempt workers, DOL Opinion Letter 2006 WL 2792443; rank-and-file firefighters or police officers, DOL Opinion Letter 2005 WL 3308611.

#### **The Administrative Exemption:**

The open-ended scope of the federal “Administrative” exemption is indicative of the expansion in overtime pay exemptions which will follow the proposed statutory change. Adoption of the federal language will reduce from 5 to 3 the criteria that must be satisfied to exempt an employee from overtime pay.

N.J.A.C. 12:56-7.2 exempts from overtime regulations, an “Administrative” employee, which means any employee: (1) whose primary duty consists of the

performance of office or non-manual work directly related to management policies or general internal business operations; and (2) who customarily and regularly exercises discretion and independent judgment; and (3) who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; or who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or who executes under only general supervision special assignments and tasks; and (4) who devotes less than 20 percent of his or her work to nonexempt work or less than 40 percent if employed by a retail or service establishment; and (5) who is compensated for his or her services on a salary or fee basis, exclusive of gratuities, board, lodging or other facilities of at least \$400 per week. Administrative also includes employees whose primary duty consists of sales and who receives at least 50 percent of his or her total compensation from commissions and total compensation of at least \$400 per week.

The federal code, 29 C.F.R. § 541.200, applies the “administrative” exemption generally to an employee whose primary duty involves the “exercise of discretion and independent judgment in matters of significance.” The scheme examines the exemption in light of the following criteria: whether the employee (1) is compensated at or above \$455 a week; (2) is primarily charged with non-manual work related to management or business operations; (3) exercises discretion and independent judgment with respect to matters of significance. An employee exercises independent discretion and judgment when the employee makes a decision after evaluating various alternatives.

The “administrative exemption” depends largely on whether the employee in question possesses the discretion to make decisions. So for instance, the federal scheme

has found that the “administrative” exemption does not apply to: a court reporter, because her primary duty, manual transcription work, does not require the exercise of discretion or independent judgment, DOL Opinion Letter 2007 WL 5130265; social workers and social service caseworkers whose work is not related to business operations or management, DOL Opinion Letter 2005 WL 3308621; rank-and-file firefighters or police officers, DOL Opinion Letter 2005 WL 3308611.

**Bona Fide Professional Exemption:**

New Jersey’s overtime scheme exempts from overtime pay requirements any employee: (1) whose primary duty is the performance of work which requires advanced scientific knowledge, which is original and creative in a recognized field of artistic endeavor, or which requires highly specialized knowledge in computer systems; and (2) whose work requires the consistent exercise of discretion and judgment; and (3) whose work is predominantly intellectual and varied in character and whose output cannot be standardized to a given period of time; and (4) who devotes less than 20 percent of the workweek to nonexempt work; and (5) who is compensated on a salary or fee basis, exclusive of gratuities, at a rate of at least \$400 per week. N.J.A.C. 12:56-7.3.

The federal exemption, 29 C.F.R. § 541.300, applies the “bona fide professional”, sometimes known as the “learned professional”, exemption generally to any employee who: (1) is compensated at or above \$455 a week; and (2) whose primary duty is the performance of work which either (i) requires knowledge of an advanced type in a field of science or learning, which is acquired by prolonged specialized intellectual instruction, or (ii) requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

For instance, the “learned professional” exemption would exclude an airline pilot educated in standard aviation, but would include pilots educated in specialized fields like aerial meteorological research or aerial mapping. DOL Opinion Letter 2009 WL 648998. The federal scheme has found that the “bona fide professional” exemption does not apply to: a court reporter, because her primary duty, manual transcription work, requires only general knowledge, which may be acquired through any academic degree or through apprenticeship, DOL Opinion Letter 2007 WL 5130265; rank-and-file firefighters or police officers, DOL Opinion Letter 2005 WL 3308611.