



26 of 44 DOCUMENTS

NEW JERSEY REGISTER

Copyright © 2011 by the New Jersey Office of Administrative Law

VOLUME 43, ISSUE 17

ISSUE DATE: SEPTEMBER 6, 2011

RULE ADOPTIONS

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

43 N.J.R. 2352(a)

Adopted Amendment: N.J.A.C. 12:56-6.1

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

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

Proposed: March 21, 2011 at 43 N.J.R. 725(a).

Adopted: August 15, 2011 by Harold J. Wirths, Commissioner, Department of Labor
and Workforce Development.

Filed: August 15, 2011 as R.2011 d.240, **without change**.

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

Effective Date: September 6, 2011.

Expiration Date: July 25, 2013.

Summary of Hearing Officer's Recommendations and Agency's Response:

A public hearing regarding the proposed amendment, repeals and new rules was held on April 15, 2011 at the Department of Labor and Workforce Development. David Fish, Regulatory Officer, was available to preside at the public hearing and to receive testimony. One individual testified at the public hearing and her comment is discussed below following the written comments. Written comments were also submitted directly to the Office of Legal and Regulatory Services. After reviewing the testimony and written comments, the hearing officer recommended that the Department proceed with the amendment, repeals and new rules without

change. The record of the public hearing may be reviewed by contacting David Fish, Regulatory Officer, Office of Legal and Regulatory Services, Department of Labor and Workforce Development, P.O. Box 110, Trenton, New Jersey 08625-0110.

Summary of Public Comments and Agency Responses:

Written comments were submitted by the following individuals. The number(s) in parentheses after each comment identifies the respective commenter(s) listed below.

1. Gary S. Young, Herrick Feinstein LLP (on behalf of the New Jersey Restaurant Association), Newark, NJ;
2. Bob Earl and Jack Wellman, Co-Chairs, Legal Legislative Committee, New Jersey Staffing Alliance, Kinnelon, NJ;
3. Stefanie Riehl, Assistant Vice President, New Jersey Business and Industry Association, Trenton, NJ;
4. Michael A. Egenton, Senior Vice President, New Jersey Chamber of Commerce, Trenton, NJ;
5. Paul Tang, General Counsel, Burlington Coat Factory, Burlington, NJ;
6. Diane Walsh, Vice President of Government Affairs and Communications, Commerce and Industry Association of New Jersey, Paramus, NJ;
7. Michael DeLoreto, Director of Government Affairs, New Jersey Food Council, Trenton, NJ;
8. Board of Directors, Tri-State Human Resource Management Association, Cherry Hill, NJ;
9. John J. Sarno, President, Employer Association of New Jersey, Livingston, NJ;
10. Charles Wowkanech, President, and Laurel Brennan, Secretary-Treasurer, New Jersey State AFL-CIO, Trenton, NJ;
- [page=2353] 11. Kristin DiSandro, Director of Practice and Research, JNESO Union, North Brunswick, NJ; and
12. Bernie Gerard, Jr., Vice President, Health Professionals and Allied Employees, Emerson, NJ.

COMMENT: The commenters are fully supportive of the proposed amendment, repeals and new rules. Following are several excerpts from their remarks: "As employers, our members applaud the proposal as it provides necessary clarification and guidance and eradicates the discrepancies and possible pitfalls created between state and federal law"; "When New Jersey can accept a position that is in common with the position of the Federal government on a subject, then the operation of New Jersey businesses and non-New Jersey firms with operations in New Jersey is simplified since there will be one standard to adhere to, rather than multiple ones"; and "This is one more step that will make New Jersey that [much] more attractive and acceptable to new investment by multi-state, national and even global enterprises." (1 through 8)

RESPONSE: The Department thanks the commenters for their support.

COMMENT: The commenter is supportive of the proposed repeal of N.J.A.C. 12:56-7. He observes, however, with regard to the adoption by reference of 29 CFR Part 541 that, "N.J.A.C. 12:56-7 is limited to the current exemptions themselves and it does not appear from the face of the rule proposal that Part 541 will be adopted in its entirety." For example, the commenter suggests that the adoption by reference of 29 CFR Part 541 would not include the adoption by reference of certain subsections of 29 CFR 541.602, adding that "[n]ow the Department has the best opportunity to provide a solution to the problem by formally adopting a rule consistent with section 602(b) and (c)." (9)

RESPONSE: The Department thanks the commenter for his support of the repeal of N.J.A.C. 12:56-7. However, with regard to the commenter's observation regarding the adoption by reference of 29 CFR Part 541, the Department must respectfully disagree. The Department is adopting by reference, with one limited exception, the entirety of 29 CFR Part 541. The limited exception is set forth within N.J.A.C. 12:56-7.2(b) and refers exclusively to those provisions within 29 CFR Part 541 that apply solely to individuals who are employed by government employers. The reason for this limited exception is explained in the notice of proposal (43 N.J.R. 725(a)). This should in no way affect the adoption by reference of the remainder of 29 CFR Part 541, including the adoption by reference of 29 CFR 541.602.

COMMENT: Mr. Wowkanech and Ms. Brennan object to the proposed amendment, repeals and new rules based on the assertion that adopting the Federal overtime exemptions for bona fide executive, administrative, professional and outside sales employees "will translate into employees losing their overtime eligibility." Ms. DiSandro maintains that adoption of the Federal white-collar overtime exemptions will result in registered nurses being considered "learned professionals," thereby making them exempt from overtime. This circumstance, Ms. DiSandro contends, "will . . . dramatically decrease the income of working nurses . . . [and] lead to poor patient outcomes, due to lack of adequate staffing." Mr. Gerard expresses "serious concerns" about the Department's proposed amendment, repeals and new rules. He maintains that many workers who are exempt from overtime under the Federal regulations "have protections and guarantees" because of the State rules. Specifically, he states that unlike the Federal regulations, New Jersey rules regarding exemptions for overtime contain a "threshold provision that requires that exempt employees must devote less than 20 percent of their time to non-exempt work or less than 40 percent of their time to non-exempt work if employed by a retail or service." Mr. Gerard observes that analogous Federal regulations, which would be adopted by the State, "would only require that an employee's 'primary duty' be the performance of exempt work." (10, 11 and 12).

RESPONSE: As indicated in the notice of proposal for the amendment, repeals and new rules (43 N.J.R. 725(a)), and as noted by the court in *Marx v. Friendly Ice Cream Corporation*, 380 N.J. Super. 302 (App. Div. 2005), repealed N.J.A.C. 12:56-7 regarding exemptions from overtime for bona fide executive, administrative, professional and outside sales employees 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 U.S. Department of Labor substantially revised the Federal regulations regarding overtime exemptions for bona fide executive, administrative, professional and outside sales employees; however, New Jersey had not until now made the necessary changes to N.J.A.C.

12:56-7, so as to ensure that New Jersey's rules regarding exemptions from overtime for bona fide executive, administrative, professional and outside sales employees continue to be modeled on and informed by the Federal overtime exemption regulations. In light of the original design of these particular State rules - that is, that they were modeled on the Federal regulations - and in the absence of any unqualified affirmative statement rejecting the August 2004 revisions to the Federal overtime exemption regulations, it is the Department's position that its post-2004 failure (prior to now) to reconcile State rules regarding exemption from overtime for bona fide executive, administrative, professional and outside sales employees with the Federal regulations upon which the State rules were modeled was an oversight. To the degree that this oversight has inadvertently inured to the benefit of certain parties, thereby affording them for the past approximately seven years an unintended economic windfall, that circumstance will now indisputably change. Nevertheless, as indicated in the notice of proposal (43 N.J.R. 725(a)), it is the Department's reasoned judgment that the goal of ensuring consistency between these particular State rules and Federal regulations, as was originally intended, and the benefits to be derived therefrom, outweigh any of the potential negative impacts to individuals speculated by the commenters.

Patricia A. Smith, Chamber of Commerce Southern New Jersey, Voorhees, NJ testified at the April 15, 2011 public hearing.

COMMENT: The commenter fully supports the proposed amendment, repeals and new rules. Her testimony echoes the comments submitted by the first eight individuals listed in Comment 1 above.

RESPONSE: The Department thanks the commenter for her support.

Federal Standards Statement

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

Full text of the adopted amendment and new rules follows:

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. 12:56-7.1, 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.

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).