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New Jersey Issues Proposed Regulations to Restore Its Exemption for Commissioned Sales Employees

By Tammy McCutchen

In an ASAP published on October 17th, Littler reported that, in recent amendments to its overtime regulations, New Jersey had inadvertently eliminated the exemption for sales employees paid on commission, which closely tracked an exemption in Section 7(i) of the Fair Labor Standards Act (sometimes known as the “inside sales” exemption).

After Littler assisted in drawing attention to this issue, the New Jersey Department of Labor and Workforce Development (“New Jersey DLWD”) published on November 21, 2011, a proposed amendment to its regulations designed to restore the exemption. A public hearing on the proposed amendment is scheduled for Tuesday, December 13, 2011, and written comments are due by January 20, 2012. Final regulations, then, could issue as early as February.

Like the FLSA, the New Jersey overtime pay statute includes exemptions for executive, administrative, professional and outside sales employees. See N.J. Rev. Stat. § 34:11-56a4. Although the New Jersey statute does not contain an exemption similar to FLSA Section 7(i), the New Jersey regulations had defined “administrative” employees as including “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.” N.J. Admin. Code § 12:56-7.2(b).

New Jersey recently amended section 12:56-7.2 of their regulations to adopt the federal regulations at 29 C.F.R. Part 541. The New Jersey regulation now states: “Except as set forth in (b) below, the provisions of 29 CFR Part 541 are adopted herein by reference.” However, although the FLSA Part 541 regulations define the exemptions in Section 13(a)(1) of the Act – executive, administrative, professional, computer and outside sales employees – those federal regulations do not cover the FLSA Section 7(i) exemption for commissioned sales employees of a retail or service establishment. Thus, since the New Jersey regulations no longer define the administrative exemption to include commissioned sales employees – and neither do the FLSA Part 541 regulations – New Jersey currently does not recognize an exemption for commissioned sales employees.

The proposed amendment will restore the prior regulatory language establishing that the “administrative” exemption “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.”

The New Jersey DLWD confirmed that its prior elimination of this language was an “unintended consequence” of the prior rulemaking, which it “intend[s] to reverse through the rule amendment proposed herein.”

Although the proposed amendment will restore the New Jersey exemption for commissioned sales employees, unless further changes are made, the New Jersey exemption will have significant differences from the FLSA Section 7(i) exemption. The New Jersey exemption, for example, will require employees to have a “primary duty” of sales, while the FLSA exemption does not contain any duty requirements. Thus, the New Jersey exemption will remain more narrow than the FLSA exemption.

On the other hand, the New Jersey exemption applies to employees earning only \$400 per week, while the FLSA exemption requires employees to have a regular rate of at least 1.5 times the minimum wage. Thus, in most weeks, to be exempt under Section 7(i), an employee would have to earn more than \$400 ($\$7.25 \times 1.5 \times 40 \text{ hours} = \435).

Employers and employer groups may want to consider filing comments urging the New Jersey DLWD to make New Jersey law consistent with the FLSA by adopting the Section 7(i) requirements. Otherwise, to treat commissioned sales employees as exempt, even with the restoration of the New Jersey exemption, employers will need to ensure that employees meet both tests – the FLSA Section 7(i) test and the New Jersey regulatory test – independently.

Tammy McCutchen, a Shareholder in Littler Mendelson’s Washington, D.C. office, was the primary author of the 2004 revisions to the FLSA Part 541 regulations while serving as Administrator of the United States Department of Labor’s Wage and Hour Division. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. McCutchen at tmccutchen@littler.com.