



Legal Alert: Watch Out Employers of Commissioned Sales People in New Jersey – They're No Longer Exempt

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Executive Summary: In a development that could significantly impact employers in New Jersey, the state's Department of Labor (DOL) recently amended the regulations interpreting New Jersey's wage and hour laws and, in doing so, appears to have eliminated the commissioned sales exemption under state law.

Background

Recently, the New Jersey DOL amended its wage and hour regulations to follow the federal regulations. In doing so New Jersey changed the language of its regulations to adopt the Fair Labor Standards Act's (FLSA) white collar exemptions located at 29 CFR 541. The amended regulation reads: "*Except as set forth in (b) below, [addressing government employees] the provisions of 29 CFR Part 541 are adopted herein by reference.*"

The FLSA's exemptions listed at Part 541 are known as the "white collar" exemptions and include the administrative, executive, professional and outside sales exemptions. The commissioned sales exemption, often referred to as the "inside sales" or "retail sales" exemption is not a white collar exemption and is therefore not discussed in 29 CFR Part 541.

New Jersey's wage and hour law historically treated commissioned sales employees as exempt from overtime under the state's white collar administrative exemption. The defunct New Jersey administrative regulation exempted "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" from New Jersey's overtime law. Since there is no similar language in the 541 exemptions, the New Jersey commissioned sales exemption was eliminated by the amendment.

Moreover, the New Jersey amendment did not adopt the federal commissioned sales exemption, which is codified at section 7(i) of the FLSA and not referred to in Part 541. Section 7(i) of the FLSA exempts employees from overtime if:

- the employee is employed by a retail or service establishment as defined by the DOL, and
- the employee's regular rate of pay exceeds one and one-half times the

applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and

- more than half the employee's total earnings in a representative period consist of commissions.

The failure to include the section 7(i) exemption in the New Jersey amendment prevents employers from relying on the FLSA's 7(i) exemption in New Jersey.

Employers' Bottom Line:

Based on information obtained from the New Jersey Wage Hour Commissioner, the omission of 7(i) appears to be inadvertent. The New Jersey DOL will most likely continue to recognize the 7(i) commissioned sales exemption and we anticipate the NJDOL will amend the regulations to expressly adopt the 7(i) exemption. However, until the regulation is amended employers face the risk of a private class action based on the change in the regulation. Courts applying the amended regulation will most likely find employers who fail to pay commissioned sales employees overtime to be in violation of New Jersey wage and hour law.

If you have questions regarding this issue or other labor or employment law issues, please contact the Ford & Harrison attorney with whom you usually work or the author of this Alert, Sal Simao, a partner in our New Jersey office, at ssimao@fordharrison.com or 973-646-7302.