

Commissioned Salespersons No Longer Exempt From Overtime Under New Jersey Law?



Article By

[Labor Employment Giordano
Giordano, Halleran & Ciesla, P.C.](#)

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In an attempt to create more consistency between New Jersey law and federal law, the **New Jersey Department of Labor (NJDOLE)** recently amended its wage and hour regulations to adopt the federal Fair Labor Standards Act's (FLSA or Act) white collar exemptions from minimum wage and overtime requirements. What was anticipated to be a welcome change for employers has quickly become a source of frustration. The upside is that employers can now rely on one common set of rules in classifying employees for overtime purposes under both federal and New Jersey law. The downside is that the amendments have inadvertently eliminated a key exemption previously available to New Jersey employers; the commissioned salesperson exemption.

The amended New Jersey regulation expressly adopts the federal provisions of **29 CFR Part 541**. However, the FLSA exemptions listed in Part 541, known as the "white collar" exemptions, include only the administrative, executive, professional, and outside sales exemptions. Conspicuously absent from Section 541 is the FLSA's version of the commissioned salesperson exemption, which is set forth separately, in Section 7(i) of the Act.

New Jersey's regulations previously contained a commissioned salesperson exemption which allowed employers to exempt from overtime any "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.” This exemption has been relied on by countless employers in classifying qualifying sales persons as exempt from overtime. However, because the newly amended regulations do not adopt Section 7(i) of the FLSA, New Jersey law as it currently stands does not recognize any commissioned salesperson exemption from minimum and overtime requirements.

The result: New Jersey employers who have properly classified employees as exempt under the commissioned salesperson exemption in the past must now reconsider these employees’ exempt status. While the omission of Section 7(i) from the amended regulations appears to have been a mistake, New Jersey employers who continue to rely on the commissioned salesperson exemption run the risk of violating New Jersey’s current minimum wage and overtime provisions.

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