



LABOR & EMPLOYMENT DEPARTMENT

ALERT

NEW JERSEY ADOPTS FEDERAL WHITE COLLAR EXEMPTIONS

By Mark E. Tabakman and Ian W. Siminoff

Under both New Jersey (NJ) and Federal law, unless exempt, employees who work more than 40 hours in a given week are required to be paid at least one-and-a-half times their regular hourly rate.

On August 23, 2004, the United States Department of Labor (USDOL) substantially revised the Federal overtime “white collar” exemptions for executive, administrative, professional and outside sales employees, making it easier for employers to fit employees into those exemptions.

NJ did not adopt those changes. Nor was it required to, as the FLSA does not preempt stricter state standards. Thus, between 2004 and September 6, 2011, Federal and NJ white collar exemptions differed, causing confusion and compliance challenges for NJ employers. The distinction made it especially difficult for NJ’s largest multi-state employers, effectively precluding them from maintaining uniform employee classification and payroll systems.

The two key distinctions between NJ’s then overtime exemptions and the 2004 FLSA amendments were as follows:

- First, under the 2004 FLSA amendments, employees are exempt if their “primary duty” is the performance of exempt work. Primary is generally thought of as more than 50%, although, as the FLSA regulations make clear, even employees who spend less than 50% of their time performing exempt work can qualify, depending upon the circumstances. Under NJ law, employees needed to spend more than 80% of their time on exempt work to qualify for the white collar exemptions. NJ Courts noted

that this standard “pose[d] difficult questions of interpretation and application.”

- Second, the 2004 FLSA amendments require, like NJ, that administrative employees’ primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. However, the federal amendments impose no similar discretion and independent judgment requirement on executive or professional employees. NJ law, in contrast, required that executive, administrative and professional employees exercise discretion and independent judgment in order to be considered exempt.

Effective September 6, 2011, the New Jersey Department of Labor and Workforce Development adopted the FLSA “white collar” exemptions, replacing the more burdensome overtime exemptions that existed under New Jersey’s Wage and Hour law. The single sentence adoption applies to all private sector employers.

These changes will likely result in a greater number of employees being classified as exempt, resulting in less overtime paid, and thus, employer savings. Of course, employee groups and unions are not happy with these changes. The NJ Wage and Hour Division conceded as much in the legislation’s preamble, noting that the “new rules may have a negative impact on employees who will seek to recover overtime premium pay against employers under the New Jersey overtime law and rules in that the simplified post-2004 Federal overtime exemption regulations . . . contain short tests, which impose fewer requirements on employers to establish exemptions.”

Although the Division also concluded that the

simplification of the revisions will result in fewer employers “running afoul of the State overtime law and rules,” the fact remains that these determinations are fact-sensitive, and the burden of establishing exemptions remains with the employer. Depending upon the size of the workforce, mistakes can result in judgments or settlements in the hundreds of thousands to millions of dollars.

Our recommendation, in light of the “new” Federal/NJ exemption tests, is that NJ employers conduct internal audits to determine if the positions they classify

as exempt remain exempt and whether there are positions classified as non-exempt that can be reclassified as exempt.

For more information about this Alert, please contact Mark E. Tabakman at mtabakman@foxrothschild.com or 973.994.7554 or Ian W. Siminoff at isiminoff@foxrothschild.com or 973.994.7507 or any member of Fox Rothschild’s Labor & Employment Department. Visit us on the web at www.foxrothschild.com.



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