

Employers Association of New Jersey

A nonprofit association serving employers since 1916

May 2, 2011

David Fish,
Regulatory Officer
Office of Legal and Regulatory Services
N.J. Department of Labor and Workforce Development
P.O. Box 110 – 13th Floor
Trenton, New Jersey 08625-0110

Re: Comments to the Repeal and Proposed New Rule: N.J.A.C. 12:56-7, Exemptions from Overtime.

Dear Mr. Fish:

The Employers Association of New Jersey (EANJ) submits the following comments to the N.J. Department Labor and Workforce Development (the "Department"), which has proposed to repeal and propose a New Rule: N.J.A.C. 12:56-7, Exemptions from Overtime.

EANJ commends the Department for undertaking the long overdue review of N.J.A.C. 12:56-7. Indeed, in proposing the repeal of N.J.A.C. 12:57-7, the Department has observed inconsistencies that have caused "considerable confusion and consternation within the regulated community." See Rule Proposals, vol. 43, March 21, 2011.

EANJ understands that the Department is proposing a new rule that would adopt by reference federal rule 29 CFR Part 541. However, 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, in its comments to the re-adoption of N.J.A.C. 12:56, dated April 26, 2011, EANJ suggested that the Department adopt a Safe Harbor rule consistent with Part 541. To the extent that the Safe Harbor rule is consistent with the repeal and adoption of a new rule N.J.A.C. 12:56-7, please incorporate by reference herein the relevant portion the EANJ's April 26, 2011 comments.

As noted in EANJ's April 26th comments, EANJ fields numerous calls from its employer-members on a wide variety of workplace issues, including the proper interpretation and application of the state's wage and hour rules. The Department now has the opportunity to remedy some of the more vexing issues faced by employers by incorporating sections of 29 CFR Part 541, specifically section 602 which addresses matters arising out of the interpretation of "Salary Basis."



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Moreover, EANJ believes that such an incorporation of section 602 can be adopted under the current repeal and proposal or under the authority of S-2014, which permits “substantial changes” to a proposed rule. See EANJ’s April 26, 2011 comments (“Under S-2014, “substantial changes” means “any changes to a proposed rule that would significantly: enlarge or curtail who and what will be affected by the proposed rule; change what is being prescribed, proscribed or otherwise mandated by the rule; or enlarge or curtail the scope of the proposed rule and its burden on those affected by it.”).

As the Department will note, section 602(a) sets forth the general rule that an exempt, salaried employee must be paid on a “salary basis.” Thus, an exempt, salaried employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.” While simple on its face, applying the “salary basis test” has led to innumerable misinterpretations and most likely many misinformed complaints to the Department. The problem of course is that the layperson does not understand the exceptions to the general rule. The fact that there is no state rule or regulation setting forth these exceptions only exacerbates the problem. Now 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).

Generally, section 602(b) sets forth the deductions that can be permissibly made and therefore would not defeat the salary basis test. Deductions for absences of one more full days occasioned by sickness or disability are allowed if made in accordance with a written policy or common practice. Deductions for infractions of safety rules of major significance can be made. Deductions for disciplinary suspensions for one or more full days are permissible.

An employer is not required to pay the full salary in the initial or terminal week of employment. This little understood but straight forward rule is necessary to stem the tide of misinformation and frivolous complaints. And what about allowable deductions under the Family Medical Leave Act? The Department needs to clarify that these deductions also apply to the New Jersey Family Leave law.

Finally, section 602(c) provides a useful rule when calculating the amount of the deduction. Without this rule, exempt, salaried employees often believe that they are being unfairly docked. Worse, unsophisticated employers believe that they have done something wrong. While EANJ concedes that there is simply no excuse for a misinformed employer, the Department can make a big positive difference by adopting 29 CFR Part 541, section 602 in its entirety.

On a personal and historical note, EANJ welcomes the opportunity to submit these comments and recognizes the Department’s efforts to provide consistency between the federal and state wage and hour rules. As the Department has noted in its Notice of Rule Proposal, dated March 21, 2011, a state appellate court in *Marx v. Friendly Ice Cream Corp.* (2005) observed that state wage and hour rules have been modeled on and informed by the federal rules. Therefore, EANJ respectfully requests new rules consistent with this commentary.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John J. Sarno", is written over the typed name and title.

John J. Sarno
President
Employers Association of New Jersey