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New Jersey Adopts Federal White Collar Exemptions

On September 6, 2011, New Jersey repealed its existing state regulations defining overtime exemptions and expressly adopted the exemptions for administrative, executive, professional, outside sales, and computer employees as defined by federal regulations (29 C.F.R. Part 541) interpreting the Fair Labor Standards Act ("FLSA"). The only noted exception to New Jersey's complete adoption of the FLSA definitions is that those provisions applying solely to government employees are excluded under New Jersey state law because New Jersey does not define "employer" as including government employers. New Jersey's adoption of the FLSA is significant because, prior to the adoption, it was unclear whether New Jersey recognized the FLSA's highly compensated employee exemption which lessens the employer's burden of proving an employee is exempt where they make at least \$100,000 per year.

Although, overall, this is great news for New Jersey's private employers, several issues remain unclear. First, it is unclear how New Jersey courts will apply this change in law to pending class actions where the class period spans the change in regulation. Under existing law in other jurisdictions, it is possible the courts will bifurcate the claim period and apply the amended regulations only to claims arising after the effective date of the amendment. *See Baden-Winterwood v. Life Time Fitness, Inc.*, 566 F.3d 618, 628-30 (6th Cir. 2009) (bifurcating claim period and applying different salary basis tests to pay periods before and after the 2004 amendment to the FLSA regulations); *In re Dollar Gen. Stores FLSA Litig.*, 766 F. Supp. 2d 631, 638 (E.D.N.C. 2011) (applying "the short test under former regulations to pay periods occurring before 23 August 2004, and the current regulations apply to pay periods occurring after that date."); *Kanatzer v. Dolgencorp, Inc.*, 2010 U.S. Dist. LEXIS 67798, *n. 2 (E.D. Mo. 2010) ("Where, as here, the claim period spans the change in regulation, it is appropriate to apply the

amended regulations to the actions occurring after the amendment took effect, while applying the un-amended regulation to the actions occurring before the amendment."); *Davis v. Mountaire Farms, Inc.*, 551 F. Supp. 2d 343, 348 (D. Del. 2008) (same).

Alternatively, employers could argue that the new regulations should apply throughout the entire class period, including claims that pre-date the amendment. New Jersey recognizes an exception to the general rule against retroactive application where the administrative changes were "curative" of the pre-existing framework and designed to clarify - rather than change - the law. See *Kendall v. Snedeker*, 219 N.J. Super. 283, 287 (N.J. Super. 1987) (noting exception to the general rule of prospective application for "curative" amendments to clarify rather than change the law); *Gibbons v. Gibbons*, 86 N.J. 515, 524 (N.J. 1981) (finding retroactive application appropriate where "the amendment . . . is curative insofar as it reflects the Legislature's intent to improve a statutory scheme already in existence."). The legislative history accompanying New Jersey's recent adoption of the federal standards suggests that New Jersey has always intended its wage-and-hour laws to be consistent with the federal framework. See 43 N.J.R. 2352(a) (Sept. 6, 2011) (stating that New Jersey's post-2004 failure to reconcile State rules regarding exemptions with the Federal regulations was an "oversight."). This argument, however, has yet to be tested by New Jersey courts.

Also unclear, is that New Jersey's adoption of the FLSA exemptions coupled with the repeal of existing state definitions inadvertently omitted a long-recognized exemption in New Jersey for commissioned inside salespeople. This is because New Jersey previously recognized as an "administrative" employee, an employee whose "primary duty consists of sales activity and who receives at least 50 percent of his or her total compensation from commissions. The federal regulations do not similarly define the administrative exemption as including inside salespersons. Recognizing their error, on November 21, 2011, the New Jersey Department of Labor and Workforce Development proposed a rule to readopt the omitted language recognizing commissioned sales people as exempt under the administrative exemption. Written comments will be accepted on this new rule through January 20, 2012.

Lessons Learned: Employers should take comfort that, at least post-September 6, 2011, private employees will be considered exempt under New Jersey state law if they satisfy the definitions applicable to the FLSA. However, until tested by the courts, it is unclear how this change in law will apply to ongoing litigation that spans the amended rules. Employers should consider the

February 7, 2012
Page 3

above arguments to support application of the new rules to existing class claims. Finally, in light of New Jersey's inadvertent repeal of the inside salesperson exemption, employers should be cautious and consider limiting those employees' hours until the exemption is readopted in the coming year.