

ii. The payments are made pursuant to a bona fide profit-sharing plan or trust, or thrift or savings plan to the extent to which the amounts paid to the employee are determined without regard to hours of work, production or efficiency; or

5. Contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan providing for old age, retirement, life, accident, or health insurance or similar benefits for employees; or

6. Additional premium compensation for hours worked in excess of eight hours per day, or for work on Saturdays, Sundays, holidays, or regular days of rest; or

7. Overtime premiums.

Amended by R.1990 d.520, effective November 5, 1990.  
See: 22 N.J.R. 2235(a), 22 N.J.R. 3379(b).  
Stylistic revisions.

#### 12:56-6.7 Offsets; cash payments

(a) Overtime premium payments shall not be offset by allowances for the value of food, lodging or gratuities since such allowances are already considered in determining the straight time wages paid. Overtime premium payments shall be cash payments by the employer.

(b) Where the employee's pay includes the value of gratuities, food or lodging and it is not feasible to determine the exact regular hourly wage during a particular week, the employer shall be deemed to have fulfilled the overtime requirements of this chapter if the premium payment for the overtime hours is paid in cash on the basis of the agreed hourly wage, but in no event shall the premium payment be at a rate less than the applicable minimum rate.

### SUBCHAPTER 7. EXEMPTIONS FROM OVERTIME

#### 12:56-7.1 Definition of executive

(a) "Executive" means any employee:

1. Whose primary duty consists of the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof; and

2. Who customarily and regularly directs the work of two or more other employees therein; and

3. Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring and firing and as to the advancement and promotion of any other change of status of other employees will be given particular weight; and

4. Who customarily and regularly exercises discretionary powers; and

5. Who devotes less than 20 percent of his or her workweek to non-exempt work or less than 40 percent if employed by a retail or service establishment, provided that in either case he or she retains his or her role as manager and supervises two or more full time employees; and

6. Who is compensated for his or her services on a salary basis exclusive of gratuities, board, lodging or other facilities, at a rate of not less than \$300.00 per week effective November 5, 1990, \$350.00 per week effective April 1, 1991, and \$400.00 per week effective April 1, 1992.

(b) "Executive" shall also include employees owning a bona fide equity in the enterprise of 20 percent or more.

(c) "Executive" shall not include employees training to become executives and not actually performing the duties of an executive.

Emergency Amendment, R.1980 d.506, effective November 20, 1980.  
See: 13 N.J.R. 37(a).

(a)6: \$250.00 was \$350.00; November 20 was November 1.  
Amended by R.1990 d.520, effective November 5, 1990.  
See: 22 N.J.R. 2235(a), 22 N.J.R. 3379(b).

In (a)5: revised text to specify definition of executive employee; added text with supervision responsibilities.

In (a)6: revised dates and amounts of salary rates.  
Petition for Rulemaking: repeal (a)6.  
See: 24 N.J.R. 1827(a), 24 N.J.R. 2471(a).

#### 12:56-7.2 Definition of administrative

(a) "Administrative" means any employee:

1. Whose primary duty consists of the performance of office or non-manual work directly related to management policies or general internal business operations; and

2. Who customarily and regularly exercises discretion and independent judgment; and

3. Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; or who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; or who executes under only general supervision special assignments and tasks; and

4. Who devotes less than 20 percent of his or her work to nonexempt work or less than 40 percent if employed by a retail or service establishment; and

5. Who is compensated for his or her services on a salary or fee basis, exclusive of gratuities, board, lodging or other facilities at a rate of not less than \$300.00 per week effective November 5, 1990, \$350.00 per week effective April 1, 1991 and \$400.00 per week effective April 1, 1992.

(b) "Administrative" shall also include an employee whose primary duty consists of sales activity and who re-

ceives at least 50 percent of his or her total compensation from commissions and a total compensation of not less than \$300.00 per week effective November 5, 1990, \$350.00 per week effective April 1, 1991 and \$400.00 per week effective April 1, 1992.

Amended by R.1982 d.468, effective January 3, 1983.

See: 14 N.J.R. 1145(a), 15 N.J.R. 36(a).

Amended by R.1990 d.520, effective November 5, 1990.

See: 22 N.J.R. 2235(a), 22 N.J.R. 3379(b).

In (a)5 and (b): revised and updated amounts and dates in text.

Amended by R.1995 d.553, effective October 16, 1995.

See: 27 N.J.R. 2868(a), 27 N.J.R. 3958(a).

### 12:56-7.3 Definition of professional

(a) "Professional" means any employee:

1. Whose primary duty consists of the performance of work:

i. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or

ii. Which original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the employee; and

2. Whose work requires the consistent exercise of discretion and judgment in its performance; and

3. Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work) and is of such a character that the output produced or the result accomplished cannot be standardized to a given period of time; and

4. Who devotes less than 20 percent of his or her workweek to nonexempt work; and

5. Who is compensated for his or her services on a salary or fee basis, exclusive of gratuities, board, lodging or other facilities at a rate of not less than \$300.00 per week effective November 5, 1990, \$350.00 per week effective April 1, 1991 and \$400.00 per week effective April 1, 1992.

Amended by R.1990 d.520, effective November 5, 1990.

See: 22 N.J.R. 2235(a), 22 N.J.R. 3379(b).

In (a)5: revised amounts and both current and future dates.

#### Case Notes

Former N.J.A.C. 12:56-4.3, read in pari materia with N.J.A.C. 13:36, supports defendant-employer's claim of good faith reliance on an interpretation of the Wage and Hour Law that morticians were professional. *State v. Frech Funeral Home*, 185 N.J.Super. 385, 448 A.2d 1037 (Law Div.1982).

### 12:56-7.4 Definition of outside sales person

(a) "Outside sales person" means any employee:

1. Who is employed for the purpose of and who is customarily and regularly engaged away from his or her employer's place or places of business in:

i. Making sales; or

ii. Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

2. Whose hours of work of a nature other than that described in (a)1 above do not exceed 20 percent of hours worked in the workweek; provided, that work performed incidental to and in conjunction with the outside sales person's own personal sales or solicitations, including incidental deliveries and collection, shall be regarded as exempt work. Employees who basically drive vehicles and who only incidentally or occasionally make sales shall not qualify for this exemption.

Amended by R.1990 d.520, effective November 5, 1990.

See: 22 N.J.R. 2235(a), 22 N.J.R. 3379(b).

Stylistic revisions.

Amended by R.1995 d.553, effective October 16, 1995.

See: 27 N.J.R. 2868(a), 27 N.J.R. 3958(a).

#### Case Notes

Taxi drivers are not outside salesmen, nor is a taxicab company a "common carrier by motor bus" so as to be exempt from the Wage and Hour Law. *Yellow Cab Co. of Camden v. State*, 126 N.J.Super. 81, 312 A.2d 870 (App.Div.1973), certification denied 64 N.J. 498, 317 A.2d 711 (1974).

### 12:56-7.5 Outside service employees

Employees who are dispatched to perform a service and solicit performance of an additional service shall not qualify for this exemption.

New Rule, R.1995 d.553, effective October 16, 1995.

See: 27 N.J.R. 2868(a), 27 N.J.R. 3958(a).

### 12:56-7.6 Employees exempt from overtime

Employees employed in a bonafide executive, administrative or professional capacity and outside sales persons shall be exempt from the overtime requirements of N.J.A.C. 12:56-6.1.

Recodified from 12:56-7.5 and amended by R.1995 d.553, effective October 16, 1995.

See: 27 N.J.R. 2868(a), 27 N.J.R. 3958(a).

## SUBCHAPTER 8. GRATUITIES, FOOD AND LODGING

### 12:56-8.1 Definitions

(a) "Fair value" means not more than the actual cost to the employer of the food or lodging supplied by an employer and does not include a profit to the employer nor to any affiliated business or person.