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DOL Withdraws Prior Rule That Prevented Certain Employers from Relying on the Commissioned Sales Exemption from Overtime Requirements

By Brandon Hughes & Zach Hutton

On May 19, 2020, the Department of Labor ("DOL") issued a new interpretive rule intended to provide clarity regarding the definition of "retail or service establishments" eligible to utilize the commissioned sales exemption under section 7(i) of the Fair Labor Standards Act ("FLSA").

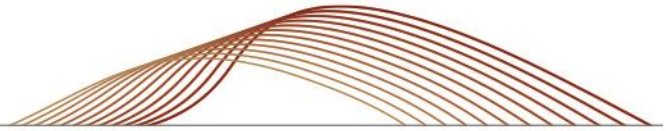
Until now, retail and service industry employers seeking to treat commissioned employees as overtime-exempt under the FLSA had to contend with a 1961 DOL rule that often confused more than it clarified. The rule provided a long "partial list of establishments" that the DOL viewed as having "no retail concept" and categorically unable to qualify for the exemption, along with a separate "partial list" of establishments that "may be recognized as retail." Numerous courts noted that the two lists were difficult to reconcile with each other, let alone any cohesive general definition. For example, the Seventh Circuit described them as an "incomplete, arbitrary, and essentially mindless catalog."

The new rule withdraws both "partial lists of establishments," but leaves intact general guidance regarding what factors determine whether a business qualifies for the exemption.

Employers with commissioned sales employees who do not qualify for the outside sales exemption may wish to reassess whether those employees may qualify as exempt under section 7(i).

The DOL's Prior Rule Categorically Disqualified Many Business from Relying on the Section 7(i) Exemption

Section 7(i) allows certain retail and service industry employers to treat commissioned employees as exempt from the FLSA's overtime pay requirements. The exemption has three elements: (1) the employee must be employed by a retail or service establishment; (2) the employee's regular rate of pay must be above one and one-half times the federal minimum wage; and (3) more than half of the employee's compensation (over a representative period of not less than one month) must come from commissions on goods and services.



The DOL interprets "retail or service establishment" to mean, among other things, that the business must be "recognized as retail sales or services in the particular industry." That generally means the business "sells goods or services to the general public" at "the very end of the stream of distribution" and does "not take part in the manufacturing process." *See generally*, 29 CFR §§ 779.312, 318.

In 1961, the DOL issued an interpretive rule without a notice-and-comment process that provided a long list of establishments it deemed categorically lacking a "retail concept," and, therefore, disqualified from relying on the section 7(i) exemption. The same rule included a separate list of establishments that "may be recognized as retail." Courts criticized both lists as seemingly arbitrary and lacking cohesion.

The new rule withdraws those regulatory provisions. The DOL explained that it issued the new rule without a notice-and-comment process because it is an interpretive rule that merely withdraws a prior interpretive regulation that also was not subject to the notice-and-comment process. In its place, the DOL now will apply a single, consistent analysis under 29 C.F.R. § 779.318 to determine whether an establishment seeking to rely on the exemption has a "retail concept."

Takeaway for Employers

Employers with commissioned employees who do not qualify for the outside sales exemption may want to reevaluate whether those workers qualify for the section 7(i) exemption. Keep in mind that state laws may vary. For example, California's commissioned sales exemption does not contain any requirement that the employee work for a "retail or service establishment," but even where the exemption applies, it extends only to overtime—not minimum wage, meal and rest period, and other requirements. Therefore, the assessment should include a careful review of applicable state laws.

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