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## DOL Expands OT Exemptions for Certain Employees of Retail and Service Establishments

### Labor & Employment Update - DOL Expands OT Exemptions for Certain Employees of Retail and Service Establishments

May 20, 2020

On Monday, May 18, 2020, the U.S. Department of Labor (DOL) issued new regulations expanding the types of employers that can qualify as "retail or service establishments" under a Fair Labor Standards Act (FLSA) overtime exemption.

#### Section 7(i) Exemption

Section 7(i) of the FLSA allows certain employees of "retail or service establishments" who are paid mostly on commission to be classified as overtime exempt.

To fall within this exemption, three conditions must be met:

- (1) the employee's regular rate of pay must exceed 1.5 times minimum wage in the workweeks the employee works overtime;
- (2) commissions on goods or services must constitute more than half of the employee's earnings; and
- (3) the employee must be employed by a "retail or service establishment."

A "retail or service establishment" is defined as an establishment where 75% of the annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.

Before yesterday, the DOL regulations surrounding the Section 7(i) exemption contained two "partial lists of establishments," which limited the types of businesses that could qualify as a "retail or service establishment". One list identified the types of businesses that "may be recognized as retail" for purposes of the Section 7(i) exemption. The other list identified the types of businesses that the DOL viewed as having "no retail concept" and were, thus, categorically unable to qualify for the Section 7(i) exemption. The "no retail concept" list contained over 130 different types of businesses, including oil well drilling and companies engaged in contract oil well drilling, sign painting shops, doctors/dentist offices, apartment houses, and accounting firms. The full list of entities on the withdrawn "no retail concept" list is available [here](#).

#### The New Rule

## **DOL Expands OT Exemptions for Certain Employees of Retail and Service Establishments, *Continued***

The new rule, which just took effect yesterday, May 19, 2020, withdraws these two lists. By removing these lists, the DOL has significantly expanded the types of businesses that can qualify for the exemption. Going forward, the same retail concept analysis applies to all establishments for purposes of the Section 7(i) exemption.

### **What Should Employers Do?**

Employers in retail or service businesses previously listed on the "no retail concept" list should review their practices surrounding commissioned-based workers and consider whether non-exempt commission-based workers may fall into the Section 7(i) exemptions. Employers who do not currently use commission-based workers may consider whether they should use such workers.

For questions regarding FLSA exemptions, please do not hesitate to contact us.

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