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## The U.S. DOL Expands “Retail and Service Establishment” Overtime Exemption

In a time when more change is not favored by employers, the U.S. Department of Labor (DOL) made a positive change to Section 7(i) of the Fair Labor Standards Act (FLSA) by expanding overtime exemptions for employees working for retail and service establishments. The old rule contained now antiquated lists (last updated in 1970) of industries presumed to qualify and presumed not to qualify as retail or service. The list of industries presumed not to qualify included industries the DOL thought of as having no “retail concept.” The old rule left businesses on the “no retail concept list” in a conundrum when they otherwise appeared to qualify as a retail or service establishment under the regulations.

The new rule ends the confusion by eliminating both lists. With the lists eliminated, all businesses will apply the same analysis with no presumption one way or the other. This should allow, more employers to take advantage of overtime exemptions for employees.

So how does an employee qualify for retail or service establishment overtime exemption? To qualify, the following requirements must be met:

1. The employer must be a “retail or service establishment,” defined under the FLSA as a business with at least 75 percent of its annual dollar volume from sales not for resale and that is commonly recognized as “retail” or “services” within its particular industry;
2. The employee’s regular rate of pay must be at least 1.5 times greater than the applicable federal minimum wage (currently \$7.25/hour) for every hour the employee works in a week in which they work overtime (over 40 hours in a workweek); and
3. More than half of the employee’s total earnings in a representative period must be commissions.

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For the second requirement, employers must determine if the regular rate of pay is 1.5 times minimum wage by dividing the employee's total earnings in the pay period by the total hours worked within that pay period. If the total is at least 1.5 times \$7.25, the requirement is satisfied.

For the third requirement, the employer selects the "representative period." It can be as short as one month but no longer than one year. This requirement will always be satisfied if the employee is paid 100 percent commissions during the representative period or if the employee earns more commissions than other earnings in each pay period. If the employee earns less in commissions than other wages in some pay periods, the employer must separately total all commissions and all other wages earned over the selected representative period. If over half of the earnings are commissions, the requirement is satisfied.

Employers in the restaurant and service industries should note that tips are **not** considered commissions under the FLSA and are addressed under separate FLSA regulations. Furthermore, employees working for the headquarters or central office of a retail or service chain may not be deemed exempt under this particular overtime exemption, however a different exemption may apply.

Employers operating in the retail and service industries should take this time to evaluate whether their commissioned employees may be exempt from the overtime regulations of the FLSA. They should also check their state overtime exemptions to ensure compliance with state laws. Not all states recognize the retail or service establishment exemption. Since this is a fact-specific analysis that may vary by employee, it is recommended that employers involve legal counsel with any exemption determinations.

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