

The Department of Labor's New Rule Expands Overtime Exemption for Certain Retail Employees

by Aaron Goldstein

On May 18, 2020, the Department of Labor ("DOL") issued its final rule expanding the Fair Labor Standards Act's ("FLSA") overtime exemption for certain retail employees paid on commission by withdrawing a list identifying certain industries as being outside the retail employee exemption.

The new rule overhauls Section 7(i) of the FLSA, which allows certain employees of "retail or service establishments" who are paid primarily on a commission basis to be exempt from the overtime provisions of the FLSA. By withdrawing regulations identifying certain industries as having "no retail concept," and certain other industries that "may be recognized as retail" for purposes of the exemption, the new rule treats all retail or service establishments as potentially meeting the criteria for the Section 7(i) exemption. The Section 7(i) exemption applies when the following conditions are met:

1. The employee is employed by a retail or service establishment.
2. The employee's regular rate of pay exceeds one and one half times the minimum wage for every hour worked in a workweek in which any overtime hours are worked.
3. More than half of the employee's total earnings in a "representative period" consist of "commissions."

The "no retail concept" list included employers such as dry cleaners, roofing companies, and travel agencies, while the list of employers that "may be recognized as retail" included home refrigerator repair companies and taxidermists. The final rule streamlines the "retail concept" analysis by applying a single analysis to all retail employers seeking qualification under Section 7(i). The regulatory change does not impose any new requirements on employers. Rather, the uniform analysis will apply to the remaining part of the rule without reference to the two lists.

Employers should assess whether their retail employees satisfy the overtime exemption outlined in Section 7(i) of the FLSA in light of the DOL's new rule. Employers that previously relied on the list of "qualified" retail employers will be scrutinized under the new Section 7(i) statutory analysis and should confirm that Section 7(i) continues to

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apply. Likewise, companies in industries that the DOL previously identified as lacking a retail concept must still be careful before reclassifying employees as exempt and should discuss with employment counsel whether their industry qualifies under the new unified test. Employers in doubt might also consider seeking an opinion letter from the DOL before making sweeping changes to how they classify their employees.