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New regulations expected to expand applicability of OT exemption for commissioned retail sales workers

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The U.S. Department of Labor issued **final regulations** today that are expected to expand the number of workers who are exempt from overtime requirements because (among other things) they work for a retail or service establishment and are paid primarily on a commission basis.

One key requirement for this overtime exemption, also known as the Section 7(i) exemption because it is in section 207(i) of the Fair Labor Standards Act, is that the workers be employed by a “retail or service establishment.” To assist in determining which employers are and are not deemed “retail or service establishments,” the DOL published interpretive regulatory guidance in 1961 that included one list of industries that were presumptively designated as “retail” and one list of industries that were presumptively designated as not “retail.” As the economy and business concepts relating to the delivery of goods and services evolved over the decades, the lists remained relatively static.

The new final rule eliminates both lists. Through the years there has been much litigation about whether a particular employer qualified as a retail or service establishment, and the DOL notes that some courts have questioned the reasoning and logic behind the two lists. The DOL has clarified that the same standards and criteria for determining “retail or service” classification should be applied to all employers.

The criteria include that a retail establishment typically “sells goods or services to the general public,” “serves the everyday needs of the community,” “is at the very end of the stream of distribution,” disposes of its products and skills “in small quantities,” and “does not take part in the manufacturing process.”

In eliminating the two lists, the DOL went straight to publication of final regulations without first providing notice and an opportunity for public comment, and the regulations take effect immediately. The DOL contends that it did not have to comply with these procedures because the 1961 interpretive guidelines were themselves issued without notice and comment, and without a delayed effective date.

The DOL’s action is generally viewed to be favorable to employers. It is expected to expand the number of businesses that can be classified as retail or service establishments. However, retail and service employers should



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keep in mind that to fully qualify for the Section 7(i) overtime exemption, there are two additional requirements: (1) The commissioned sales employee's regular rate of pay must be more than 1.5 times the applicable minimum wage rate for each hour worked in each work week, and (2) more than half of the employee's total compensation measured over a representative period must come from commissions.

As noted previously, the effective date of the withdrawal of the two lists formerly contained in **29 CFR 779.317** and **29 CFR 779.320**, is immediate.

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