

# FLSA COMMISSIONED-EMPLOYEE EXEMPTION CLARIFICATIONS: RETAILERS, IT'S TIME FOR A CHECKUP

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The Department of Labor's Wage and Hour Division deftly tackled decades of confusion regarding which establishments might have employees meeting the FLSA's 7(i) overtime exemption for certain commission-paid employees. Even if your establishment traditionally has been considered retail (and still likely would be), your practices probably could use a checkup.

## BRIEF OVERVIEW OF THE 7(I) DEVELOPMENTS

**Section 7(i)** of the FLSA provides an *overtime* exemption for *certain* commission-paid employees of *certain* establishments. The threshold question is whether an employer qualifies as a "retail or service establishment," generally meaning "an establishment [75%] of whose annual dollar volume of sales of goods or services (or both) is not for resale and is recognized as retail sales or services in the particular industry." [29 C.F.R. 779.301\(b\)](#).

The USDOL, as well as courts, look at a variety of factors – but over time agency lists of retail/non-retail business types have overshadowed the test. For example, travel agencies were on the list as lacking the retail concept, which has been rejected by at least one court based on an application of the actual, relevant factors.

The USDOL has not "expanded" the exemption *per se* in recent months, but rather removed these somewhat misleading lists in favor of the preexisting test. For many industries that have not availed themselves of the

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exemption, this is good news. However it is notable that employers who have assumed they are “retail” and that their employees qualify might face more scrutiny now.

## BEING “RETAIL” IS ONLY THE FIRST REQUIREMENT

It can be helpful to think of the exemption as broken into three tests:

1. *Determine whether the employer “establishment” qualifies.* The exemption is limited to employees of a retail or service establishment.
2. *Determine whether any of a qualifying establishment’s employees pass the commissions test based on the priorrepresentative period.* Commissions on goods or services must represent more than half the employee’s compensation for a set representative period (not less than one month).
3. *Determine whether any of these employees meet the regular rate test.* The exemption is limited to those employees whose regular rate of pay during overtime workweeks exceeds one and one-half times the minimum hourly rate applicable under the FLSA (*g.*, a regular rate of at least \$10.89 currently).

Properly applying these pay-based tests can be more complicated than meets the eye. Oftentimes steps taken to provide security to an employee (hourly pay, a guaranteed amount per pay period or month, etc.) can cause problems when an employee has a representative period with low to no commissions. On the other hand, if an employee is on a 100% commission pay structure, you must be on the lookout for drops below the regular rate threshold during periods when commissions are low.

## WHERE TO GO FROM HERE

The key here is vigilance. You should keep the following caveats in mind when confirming 7(i) compliance and when laying out the tests for others in your organization:

- **Overtime Only:** The FLSA’s 7(i) exemption is from overtime only. Timekeeping still is necessary to determine compliance with the regular rate requirement (and minimum wage). This can be difficult to ensure,

particularly when dealing with employees paid primarily or exclusively on a commission basis.

- **Job Duties Don't Matter:** This exemption is unique in that the employing establishment and the employee's pay control – there is no duties component. In other words, while not every employee of a retail establishment meets the exemption, theoretically they can be paid in such a way that they do. The exemption can be a solution for an employee that meets, for example, the executive exemption except for the salary requirement or an employee that does not meet the duties of any exemption, but is paid a commission whether based on individual, group, etc. sales.
- **Ongoing Assessment:** Once you have determined that an employee could meet the exemption, you should not just note it and forget about it. This exemption requires an analysis of the establishment at the outset (Test #1), the commissions each representative period (Test #2), and the regular rate each pay period (Test #3). In fact, if an employer experiences a drastic change in the nature of its business (particularly an uptick in non-retail revenue or absorption of departments, locations, etc.) it should consider reevaluating whether the establishment's employees are eligible for the exemption at all.
- **State Laws Really Do Vary:** Multistate employers are used to states having exemptions that might differ from the FLSA, but oftentimes are very similar. With 7(i) though, a state might have no similar exemption, or it could have additional or different requirements. Two quirky examples are New Jersey, which squeezes it in under its administrative exemption, and California, which uses a different representative period test.

## CONCLUSION

The last 7(i) exemption developments remind us all that it is important to base exemption determinations on the facts at hand. With this being a unique year for many retail employees, combined with the attention drawn to the exemption by these developments, we would encourage you to perform a checkup in collaboration with legal counsel before your next representative period.