FLSA Commissioned-Employee 7(i) Exemption – USDOL Clarifications Go Straight to Final

Insights
5.19.20

USDOL's Wage and Hour Division kicked off the week with an all-in-one maneuver. Approximately a year ago the FLSA's 7(i) overtime exemption appeared on the regulatory agenda. Without any further notice, USDOL suddenly moved on this item, and deftly tackled decades of confusion regarding which establishments might have employees meeting this exemption – without revising its position on the actual analysis.

The 7(i) Exemption: By the Statute

Section 7(i) of the FLSA provides an *overtime* exemption for *certain* commission-paid employees of *certain* establishments. 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 *prior* representative 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 is in excess of one and one-half times the minimum hourly rate applicable under the FLSA (*e.*, a regular rate of at least $10.89 currently).

Unfortunately, properly applying these tests can be more complicated than meets the eye. For example, the analysis of whether an employer qualifies as a "retail or service establishment" can cause unexpected trouble for employers – and that is where USDOL has tried to clarify matters.

The 7(i) Exemption: Interpreted

It is generally accepted, though not without some dispute, that a "'retail or service establishment' shall mean 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), *see also* 779.313. and Opinion Letter FLSA 2018-21 (cases cited therein). USDOL, as well as courts, look at a variety of factors that generally carve out employing establishments that perform a different role in the chain (manufacturer, distributor, wholesaler) as opposed to being

retail in nature. *See* 29 C.F.R. 779.318. From 1961 through 1971, the agency attempted to identify establishments "to which the retail concept does not apply" (779.317) and establishments that "may" be recognized as retail (779.320). These lists created a sort of *per se* "covered" or "not covered" response.

Industries have evolved or emerged since then (a consideration for another day), but perhaps the most troubling outcome is that over time these laundry lists took on lives of their own. In other words, even if the lists were accurate – the current USDOL apparently recognized that the takeaway might not be.

No Real Changes – Just A Reminder That Labels Do Not Control

USDOL is not "expanding" the exemption *per se*, but rather removing its own presumption that favored employees in one instance and combatting a public presumption that favored employers in the other. The fact that a particular establishment was on the non-retail list did not necessarily mean that your similarly-labeled establishment was itself lacking (though it has been an uphill battle for employers in light of that list, particularly within a USDOL investigation). At the same time, the fact that a particular establishment was on the retail list did not mean that your similarly-labeled establishment actually qualified (though perhaps, up until this point, there has been less risk of a challenge from the agency or an employee in light of that list).

Indeed, today's removal of these lists does not necessarily reflect a change in position on any of the establishments listed on either. It does, however, clarify to investigators and employee-advocates that a label should not determine whether a particular establishment is non-retail, and reminds employers that determining whether an establishment qualifies requires a fact-specific analysis. *Sound familiar?* These are the same sort of issues we see when employers, agencies, or courts analyze an employee based on examples in the white-collar exemption regulations or other authorities and guidance. Job titles do not control, and neither do industry names. It is important that you base exemption (any exemption) determinations on the actual facts at hand.

Caveats Before Proceeding

The 7(i) exemption can be very useful, but it also can be tedious and administratively burdensome when consistently ensuring compliance. Here are a few caveats to keep in mind before further considering whether 7(i) might be a good fit for some of your employees:

- 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 exemption is fairly unique in that the employing establishment and the employee's pay control – there is no duties component.
- State laws, however, might have additional or different requirements both with respect to the requirements generally and the specifics of these tests (for example, determining the representative period). In fact, not only might some states place more stock in these removed

lists than USDOL does, but at the other extreme some state versions (surprisingly, California) might be more favorable.

It is imperative that you consider all aspects of the exemption and, particularly given the attention on this exemption, you should do so in consultation with legal counsel.

The Bottom Line

USDOL took an unorthodox approach and simply *immediately* withdrew the provisions that were causing some of the confusion regarding which establishments might have employees meeting the FLSA's 7(i) exemption from overtime. Using this approach, rather than proposing revisions in a manner that might elevate a position to regulation status, the agency removed the laundry lists of decades-old examples in favor of relying on the principles themselves.

This just might be the best example of deregulatory-like action we have seen in this area. One can appreciate the agency recognizing that old habits of simply printing interpretative bulletins along with regulations did not make them regulations and can, and has, led to improper deference by courts and operated as a blanket restriction for more risk-adverse employers (Part 779 being just one example of this issue). Hopefully today's bold, but proper, move will put a spotlight on the regulations versus interpretations distinction and remind all that applying FLSA authorities requires an evaluation of the context of the silver bullet (for good or bad) language.

Service Focus

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