

# DOL Streamlines Overtime Rule for Commission-Based Retail and Service Workers

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**T**he U.S. Department of Labor (DOL) issued a final rule (<https://www.federalregister.gov/documents/2020/05/19/2020-10250/partial-lists-of-establishments-that-lack-or-may-have-a-retail-concept-under-the-fair-labor>) to simplify an overtime exemption for commission-based workers in retail and service industries.

Under the Fair Labor Standards Act (FLSA), certain employees in retail and service industries can be classified as exempt from overtime pay if they are paid primarily on a commission basis.

The DOL withdrew two previously published lists intended to help employers decide if they do not (or might not) meet the definition of a traditional retail establishment. The first list identified industries that the department previously said had "no retail concept" and were therefore not covered by the exemption. Accounting firms, construction contractors, and real estate companies are examples of such businesses. The second list identified industries that "may be recognized as retail," including auto repair shops, department stores and restaurants.

The new rule will put all employers on equal footing with respect to the exemption, said Marty Heller, an attorney with Fisher Phillips in Atlanta. "The practical effect will be to modernize the rule, as the provisions being withdrawn are dated and rely upon professions that have changed significantly over time."

The DOL noted that some courts have questioned the merit of the lists and that the new rule will allow more businesses to "assert that they have a retail concept," as long as they meet the existing definition of "retail" and certain other criteria.

"Moving forward, the department will apply the same analysis to all establishments to determine whether they have a retail concept and qualify as retail or service establishments," the DOL announced on May 18.

"Permitting all retail employers to potentially qualify for this exemption can increase flexibility for businesses and workers," said DOL Wage and Hour Division Administrator Cheryl Stanton.

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Criteria Still Must Be Met

Charles McDonald, an attorney with Ogletree Deakins in Greenville, S.C., cautioned employers that "there is no guarantee that this change in the regulations has really expanded the number of retail establishments, as the retail definition has not changed."

While the DOL's decision to remove the list of industries lacking a retail concept may provide some employers the opportunity to take advantage of the exemption, McDonald said, employers could still be subject to litigation over the applicability of the exemption.

Under the FLSA, employees generally must be paid 1.5 times their regular hourly rate for hours worked in excess of 40 in a workweek, unless they fall under an exemption from overtime pay.

*[SHRM members-only toolkit: Understanding Overtime Exemptions Under the FLSA ([www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/understanding-overtime-exemptions-.aspx](http://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/understanding-overtime-exemptions-.aspx))]*

The most common exemptions are for executive, administrative and professional (so called white-collar) employees, but there are other exemptions based on industry. Section 7(i) of the FLSA exempts certain commissioned sales employees for retail and service establishments if the following three conditions are met:

- The employee must be employed by a retail or service establishment.
- The employee's regular rate of pay must exceed 1.5 times the applicable minimum wage under Section 6 of the FLSA.
- More than half of the employee's total earnings in a representative period must consist of commissions on goods or services.

"Unless all three conditions are met, the Section 7(i) exemption is not applicable, and overtime premium pay must be paid for all hours worked over 40 in a workweek at time and one-half the regular rate of pay," according to the DOL.

McDonald noted that employers have the burden of establishing all three factors of the Section 7(i) exemption. "While the new final rule certainly seems helpful to employers, as it streamlines the definition of retail under the FLSA, employers still need to make sure they meet the definition of a retail or service establishment if they want to take advantage of the Section 7(i) overtime exemption," he said.

The FLSA defines retail and service employers as "establishments 75 percent of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

"Employers that have historically not been viewed as being a retail establishment should use caution," McDonald suggested.

Employers should also note that some states, such as California and New York, have overtime exemption criteria that conflict with the FLSA. So employers should always check applicable state laws ([www.shrm.org/ResourcesAndTools/tools-and-samples/Pages/Interactive-Tools.aspx](http://www.shrm.org/ResourcesAndTools/tools-and-samples/Pages/Interactive-Tools.aspx)) to ensure they are complying with both federal and state law.

Visit SHRM's resource page on FLSA exemption classification ([www.shrm.org/ResourcesAndTools/Pages/FLSA-Exemption-Classification.aspx](http://www.shrm.org/ResourcesAndTools/Pages/FLSA-Exemption-Classification.aspx)).

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