

New DOL Rule Lets More Employers Assert OT Exemption

By **Vin Gurrieri**

Law360 (May 18, 2020, 1:10 PM EDT) -- Fewer workers who get commissions will be eligible to receive overtime pay under federal law after the U.S. Department of Labor issued regulations Monday expanding how many employers can qualify as "retail" businesses that may fall under an exemption to the Fair Labor Standards Act.

The DOL issued a final rule, to be published in Tuesday's federal register and take effect right away, that revamps the agency's regulatory framework surrounding Section 7(i) of the FLSA, which allows certain employees of "retail or service establishments" who get paid mostly on commission to be deemed overtime exempt.

The new rule withdraws from the DOL's existing regulations a partial list of industries that the agency presumed to have "no retail concept," a designation that left them unable to claim the 7(i) exemption. The final rule also pulled a second, nonexhaustive list of businesses that "may be recognized as retail" for purposes of the exemption.

By axing the two lists, the agency said it is "promot[ing] consistent treatment" in determining whether the 7(i) exemption applies by using "the same analysis to all establishments," and added that businesses on the nonretail list can now potentially avail themselves of the 7(i) exemption if they meet the DOL's criteria for applying the exemption. The DOL also said that courts "have questioned the reasoning behind" the lists.

Moreover, the DOL said its rule will "reduce confusion" since the second list "did not necessarily affect the analysis" of whether businesses included in that catalog were, in fact, retail operations for purposes of the exemption.

Cheryl Stanton, administrator of the DOL's Wage and Hour Division, said the new rule "unshackles job creators in the retail space who had previously been categorically excluded from the exemption without notice and comment."



The U.S. Department of Labor has revamped the regulatory framework surrounding a Fair Labor Standards Act exemption for workers on commission, saying the change will "reduce confusion." (Law360)

"Permitting all retail employers to potentially qualify for this exemption can increase flexibility for businesses and workers," Stanton said. "Eliminating confusion empowers job creators to grow their businesses, comply with the law and provide even more good jobs for American workers."

The nonretail list that was originally issued in 1961 included a nonexhaustive list of 89 types of establishments that the DOL saw as having no retail concept. In 1970, the list was amended to add 45 more types of businesses, according to the DOL's rule. Businesses like dry cleaners, roofing companies and travel agencies were among those on the now-rescinded nonretail list, the rule said.

The "may be" list, when it was introduced in 1961, included on it 77 types of businesses, such as home refrigerator repair businesses and taxidermists, that were presumed as being potentially able to qualify for the 7(i) exemption, according to Monday's rule.

In a statement Monday, the DOL noted that its regulation was issued directly as a final rule without the agency first soliciting public feedback in a notice of proposed rulemaking, as federal agencies normally do before they adopt new regulations.

The DOL said that "neither notice and comment nor a delayed effective date are needed" because each of the lists it is pulling back qualify as "interpretive regulations" that were originally issued almost 60 years ago without a public notice and comment period or any waiting period for them to take effect.

For an employer to avail themselves of the Section 7(i) exemption for commission earning workers, they must show in part that the individual is employed by a "retail or service" establishment as the term as defined by the DOL.

Businesses must also show that the worker's regular rate of pay is at least one-and-a-half times greater than the applicable minimum wage for every hour someone works in a week in which they work overtime, and that at least half of the worker's total earnings in a "representative period" are commissions, according to the DOL's criteria.

Paul DeCamp, head of Epstein Becker & Green PC's wage and hour practice and former WHD administrator during the George W. Bush administration, told Law360 that businesses with commissioned employees "have struggled with figuring out whether they're covered by the Section 7(i) exemption" in the half century since the lists at issue were last updated.

He added that there was "no rhyme or reason" for having them since the DOL's standard for determining whether a business qualifies as a retail or service establishment can be applied to any industry.

"If you're a business that is on the list of industries where there is no 'retail concept' according to the DOL, you're in a kind of limbo because there's a regulation, you worry that courts might defer to it ... and so you're taking a risk if you say, 'Notwithstanding what that list says we're still going to apply 7(i),' " he said. "Then if you're not on either list — if you're an industry that is new or just wasn't covered by these two lists then you had to make a guess about, 'Well, what the heck are we supposed to do with this?'"

With the new rule withdrawing the lists in place, DeCamp said he believes that businesses "in a variety of circumstances" will be prompted to review their practices surrounding commissioned-based workers, including whether they should use them, how they would use them if they are going to, how to schedule those workers.

"What we'll see now is I suspect a number of businesses [will be] taking a fresh look at the issue and saying, 'Alright, let's forget these lists and let's take a look at what the regulations actually say in terms of the test that the DOL sets forth,'" DeCamp said.

Susan Harthill, a Morgan Lewis & Bockius LLP partner who was the DOL's deputy solicitor of labor for national operations until late 2018, similarly said that the new rule "frees" the agency and courts "to take a fresh look at any establishment" to evaluate whether they meet the various criteria for a Section 7(i) exemption "because DOL is no longer tied to its own prior interpretations in investigations and enforcement actions."

She also categorized the rule as "clearly an employer-friendly move" that was made with an eye by the agency toward "being more flexible and adapting the existing rules to more modern workplaces and business practices."

"DOL's preamble and press release may also be signaling that it is preparing to go one step further and issue 'compliance assistance' to address specific types of establishments," Harthill added. "By removing the lists, DOL may even be laying the groundwork for a more comprehensive Section 7(i) rule if there is a second term of [the Trump] administration."

--Editing by Alyssa Miller.

Update: This story has been updated with additional details and commentary.