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New DOL Rulemaking Clarifies Overtime Exemption For Retail Employees

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The U.S. Department of Labor (DOL) issued a final rule on May 19, 2020, withdrawing past regulations related to overtime exemptions for retail employees. The withdrawal is designed to clarify and "promote consistent treatment" of the retail employee overtime exemption. In issuing this final rule, the DOL took the somewhat extraordinary step of doing so without notice or a comment period. The DOL explained that such a period is unnecessary because the Administrative Procedure Act does not require notice or comment for an "interpretive rule," and the DOL's withdrawn lists were mere "interpretive rules."

Section 7(i) of the Fair Labor Standards Act (FLSA) allows retail and service industry employers to classify certain employees who are paid primarily on a commission basis as exempt from overtime requirements. In order to qualify for this exemption, "the regular rate of pay of such employee [must be] in excess of one and one-half times the [FLSA's minimum wage]," and "more than half [of the employee's] compensation for a representative period (not less than one month) [must represent] commissions on goods or services."

Critically, the employee must also be employed by a retail or service establishment, as defined by the FLSA. The DOL interpreted "retail or service establishment" as requiring the establishment to have a "retail concept," meaning that the establishment typically "sells goods or services to the general public," "serves the everyday needs of the community," "is at the very

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end of the stream of distribution," disposes its products and skills "in small quantities," and "does not take part in the manufacturing process."

Pursuant to its interpretation, the DOL previously created one non-exhaustive list of various types of establishments that lacked a "retail concept," and another list of establishments that "may be recognized as retail." The "non-retail" list included industries such as dry cleaners, tax preparers, laundries, roofing companies, travel agencies, blue printing and photostating establishments. While the "may be retail" list included industries such as coal yards, fur repair and storage shops, household refrigerator service and repair shops, masseur establishments, piano tuning establishments, scalp-treatment establishments, and taxidermists. According to the DOL, in most cases the non-retail list "did not provide any explanation for why a particular establishment categorically lacked a retail concept."

The DOL has now withdrawn the retail and non-retail lists. Rather than being tied to a static list, the DOL explained that it will now apply the exemption-qualifying analysis (set out above) to all establishments, to promote consistent treatment. The DOL also explained that the generally applicable analysis will also better account for changes and developments in industries over time. It is the DOL's position that this will lead to more consistent treatment of this exemption going forward.

This final rule has thus far been widely considered favorable for employers, as it has the potential to expand the type of business that can use the retail exemption. Employers who previously shied away from this exemption because they were included on the DOL's prior "non-retail" list may want to take a fresh look. They may find that they do qualify for the exemption under the generally applicable analysis of the FLSA and relevant DOL regulations.