

## Publications

### DOL Expands the Retail and Service Establishment Overtime Exemption

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The federal Fair Labor Standards Act (FLSA) generally requires employers to pay nonexempt employees overtime compensation for time worked in excess of 40 hours per workweek. Section 7(i) of the FLSA provides an overtime exemption for certain commissioned employees employed by a retail or service establishment. To come within this exemption, the employee must be paid more than 1.5 times the minimum wage and more than half of the employee's pay must represent commissions on goods or services. A "retail or service establishment" is one in which 75% of its annual dollar volume of sales is not for resale and is recognized as retail sales or services in the particular industry.

There has been considerable uncertainty (and litigation) over whether a business was a "retail or service establishment." For decades, the U.S. Department of Labor (DOL) maintained lists of establishments that "may be recognized as retail" and those that "may not be recognized as retail" in an effort to determine whether an establishment is or is not "retail or service." Courts criticized these lists as an "incomplete, arbitrary, and essentially mindless catalog."

On May 18, 2020, the DOL issued a final rule that withdraws two provisions from the regulations that contributed to this uncertainty. The first provision listed industries that the DOL previously viewed as having "no retail concept," which made them ineligible to claim the 7(i) exemption. The second listed industries that, in the DOL's view, "may be recognized as retail," and were potentially eligible for the 7(i) exemption. This rescission takes immediate effect.

According to the DOL, by withdrawing these two lists, establishments in industries that had been on the non-retail list may now assert that they have a retail concept. Consequently, if employers meet the existing definition of retail and other criteria, they **may** now qualify for the 7(i) exemption (for example, freight or commodity brokers, tax services, and travel agencies). This means that employers could consider whether more commission-based pay is sensible.

At the same time, and again according to the DOL, establishments in industries that were on the “may be” retail list may continue to assert they have a retail concept (such as department stores, furniture stores, and grocery stores). The DOL will now apply the same analysis to all establishments to determine whether they have a retail concept and qualify as retail or service establishments.

Contact your Vorys lawyer if you have questions about minimum wage and overtime or other wage-hour issues or how this rule change may impact your business.