

U.S. Department of Labor Expands Commission Sales Exemption to Federal Overtime Requirements

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On May 18, 2020, the Wage and Hour Division of the U.S. Department of Labor (DOL) issued a final rule eliminating a list of businesses prohibited from taking advantage of the commission sales exemption to the overtime requirements of the Fair Labor Standards Act (FLSA). As a result, more employees paid on a commission basis will be deemed exempt from the FLSA's overtime requirements. However, employers in many states, including Massachusetts, will not be able to take advantage of the rule change, as the overtime laws in many states do not recognize such an exemption.

Under the FLSA's commission sales exemption, an employee is exempt from the FLSA's overtime requirements – which require that employees be paid time-and-a-half for all hours worked over 40 in a work week – if that employee (1) is employed in a “retail or service” establishment, (2) earns at least 1.5 times the minimum wage, and (3) earns more than half of all of his or her compensation for a representative period through commissions. An employee is employed in a “retail or service” establishment if he or she works at a business which typically sells goods or services to the general public, serves the everyday needs of the community in which it is located, and is at the very end of the stream of distribution. However, in 1970, the DOL published a list of 89 businesses that could not avail itself of this commission sales exemption because they were deemed to lack a “retail concept.” Those businesses included banks, accounting firms, dry cleaners, tax preparers, lawyers' offices, travel agencies, and medical clinics, among others. The DOL's repeal of this list will permit these businesses to classify certain employees currently deemed as non-exempt and overtime eligible as exempt from the FLSA's overtime pay requirements, and therefore avoid having to pay these employees overtime.

Employers who were previously prohibited from using FLSA's commission sales exemption should analyze whether they qualify as a “retail or service” establishment under the standards set forth above. At the same time, however, employers should be sure to factor in state overtime requirements before classifying commissioned sales employee as exempt. Many states, including Massachusetts, do not recognize a commission sales exemption to its overtime requirements. In those states, employers will need to continue paying employees overtime even if they meet the criteria for the federal exemption.

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