Legal Update Article

# DOL Withdraws 'Retail or Service Establishment' Lists for Commissioned Employee Exemption Analysis

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## Meet the Authors


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The U.S. Department of Labor (DOL) withdrew its interpretative rules setting forth the types of businesses either not qualifying, or only possibly qualifying, as "retail or service establishments" when determining whether a commissioned salesperson may be exempt from overtime under Section 207(i) of the Fair Labor Standards Act (FLSA).

Rather than rely on the long lists, which were internally inconsistent and often nonsensical (as even the courts acknowledged), the DOL will apply a uniform standard to all businesses in determining whether a business qualifies as a "retail or service establishment" and, thus, potentially excluding from overtime commissioned employees who work in that business. The now-abandoned lists were developed nearly 60 years ago, with little or no reasoning or analysis, and likely no longer accurately reflected the nature of the modern workplace.

### The Commissioned Employee Exemption

Under Section 207(i) of the FLSA, commissioned employees of a retail or service establishment are excluded from the overtime provisions of the FLSA if they earn at least 1.5 times the minimum wage for all hours worked and earn more than 50% of their compensation in the form of commissions.

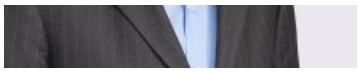
Under the applicable DOL regulations, a "retail or service establishment" is defined as one having at least 75% of its annual dollar volume of sales of goods or services (or both) not for resale and is "recognized as retail sales or services in the particular industry." In addition, it must have a "retail concept," meaning that it typically "sells goods or services to the general public," "serves the everyday needs of the community," "is at the very end of the stream of distribution," disposes its products and skills "in small quantities," and "does not take part in the manufacturing process." 29 C.F.R. §§ 779.316, 779.318(a).

### DOL's Interpretative Rules

In 1961, the DOL issued two interpretative rules, one providing a non-exhaustive list of nearly 90 types of establishments that were preemptively viewed as lacking a "retail concept" (29 C.F.R. § 779.317), the other providing a non-exhaustive list of almost 80 types of establishments that "may be recognized as retail" (29 C.F.R. § 779.320).

About 10 years later, Section 779.317 was amended again to add 45 types of establishments not qualifying as having a retail concept.

Courts, however, have struggled not only with how to apply the lists to businesses that did not clearly fall within one of the types set forth in the interpretative rules, but whether to apply the lists at all. For example, heating and air conditioning contractors appeared in Section 779.317 (lacking a retail concept), while household refrigerator service and repair



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## Related Services

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shops appeared in Section 779.320 ("may be recognized as retail"), when unquestionably both typically "sell[] goods or services to the general public, "serve[] the everyday needs of the community," and otherwise satisfy the "retail concept" elements of Section 779.318. As a result, some courts, including the U.S. Court of Appeals for the Seventh Circuit, had concluded that the interpretative rules warranted no deference, describing the lists as an "incomplete, arbitrary, and essentially mindless catalog. *Alvarado v. Corporate Cleaning Servs., Inc.*, 782 F.3d 365, 371 (7th Cir. 2015).

### The New DOL View

Now, recognizing that "an industry may gain or lose retail characteristics over time as the economy develops and modernizes, or for other reasons" and that "a static list of establishments that absolutely lack a retail concept cannot account for such developments or modernization, which could have caused confusion for establishments as they tried to assess the applicability and impact of the list," the DOL has withdrawn the lists in their entirety. And, because the interpretative rules originally were issued without notice and comment, they are being withdrawn in the same manner, thereby making the withdrawal effective immediately.

The DOL instead will apply the general "retail concept" analysis set forth in § 779.318 (discussed above) to all businesses, without any preconception as to whether such business do or do not qualify as retail or service establishments. Thus, an employer may assess, without adherence to the "lists," whether it qualifies as a "retail or service establishment," making its eligible commissioned employees overtime-exempt under the FLSA.

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Jackson Lewis attorneys will continue to monitor developments regarding the commissioned salesperson exemption, including any DOL opinion letters that may follow from the withdrawal of the interpretative rules.

If you have any questions about this development or any other wage and hour issue, please consult the Jackson Lewis attorney(s) with whom you regularly work.