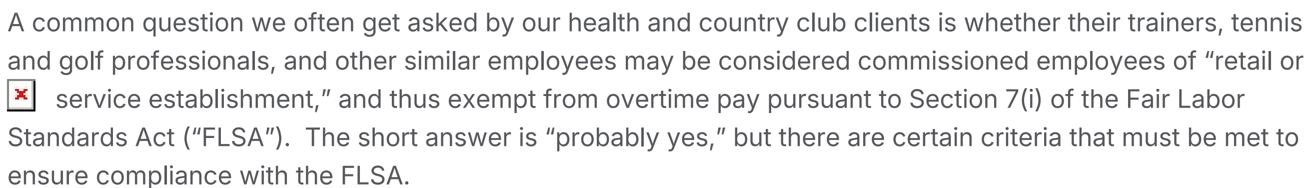
JANUARY 19, 2017 | WAGE & HOUR COMPLIANCE

Exploring FLSA Section 7(i) — Can You Use it to Exempt Commissioned Employees from Overtime?



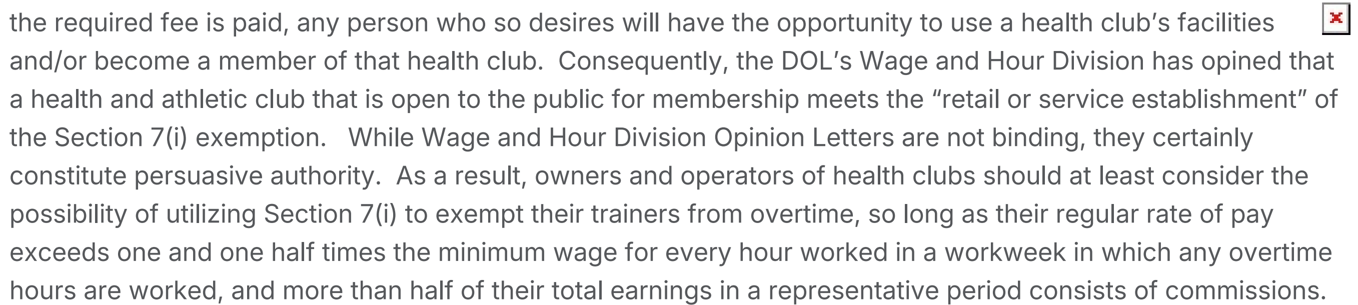
A common question we often get asked by our health and country club clients is whether their trainers, tennis and golf professionals, and other similar employees may be considered commissioned employees of "retail or service establishment," and thus exempt from overtime pay pursuant to Section 7(i) of the Fair Labor Standards Act ("FLSA"). The short answer is "probably yes," but there are certain criteria that must be met to ensure compliance with the FLSA.

By way of background, the FLSA generally requires an employer to pay overtime to any non-exempt employee who works over 40 hours during a workweek. However, as readers of this blog are likely already aware, certain "white collar" employees, such as executive, administrative, and professional employees, may be exempt from the FLSA's overtime provisions. The FLSA also exempts from overtime certain employees who are paid mostly on commissions rather than a salary basis. Specifically, Section 7(i) of the FLSA creates an overtime exemption that applies when all three of the following conditions are met:

1. The employee is employed by a retail or service establishment;
2. The employee's regular rate of pay exceeds one and one half times the minimum wage for every hour worked in a workweek in which any overtime hours are worked; and
3. More than half of the employee's total earnings in a "representative period" (of not less than one month) consists of commissions on goods or services.

While a quick examination of an employee's compensation can determine whether the second and third conditions are met, the analysis of whether an employee is employed by a "retail or service establishment" often is not as straightforward, especially in the club context. One reason for this is that although the FLSA previously defined the term "retail or service establishment," that definition was deleted in 1989 and has not been replaced. As a result, the U.S. Department of Labor's ("DOL's") regulations relating to a "retail or service establishment" continue to refer to a section of the FLSA that no longer exists. Thus, while the applicable DOL regulations state in part that "typically a retail or service establishment is one which sells goods or services to the general public," further analysis is needed to determine whether goods or services at health and country clubs are actually available to the general public.

For example, unlike a "typical" retail establishment, most health clubs require some sort of membership. Thus a member of the public cannot simply walk in to the club and use its facilities. In most cases, however, so long as



the required fee is paid, any person who so desires will have the opportunity to use a health club's facilities and/or become a member of that health club. Consequently, the DOL's Wage and Hour Division has opined that a health and athletic club that is open to the public for membership meets the "retail or service establishment" of the Section 7(i) exemption. While Wage and Hour Division Opinion Letters are not binding, they certainly constitute persuasive authority. As a result, owners and operators of health clubs should at least consider the possibility of utilizing Section 7(i) to exempt their trainers from overtime, so long as their regular rate of pay exceeds one and one half times the minimum wage for every hour worked in a workweek in which any overtime hours are worked, and more than half of their total earnings in a representative period consists of commissions.

Country clubs also typically require an individual to be a member before using its facilities and amenities. Unlike health clubs, the general public cannot simply become a member of a country club by paying a nominal fee. Rather, in all likelihood, there will be a strict admissions process, which may include an extremely hefty initiation fee plus annual dues. Thus, at first glance, a golf or tennis shop in a country club does not appear to be a retail or service establishment that sells goods or services to the general public and therefore would not qualify for the Section 7(i) exemption. However, if such a golf or tennis shop is open and available to the general public as well as to club members and is a "distinct physical place of business" separate from other facilities, it could qualify as a retail or service establishment. Additionally, most tennis and golf professionals sell goods from their respective pro shops to the general public without restriction based on membership to the club, and/or provide lessons to members of the general public (although the fee for such lessons may be higher for members of the general public). Accordingly, despite the private club establishment with an extremely limited membership, as a cost savings measure, owners and operators of such clubs may want to consider whether they can classify their tennis and golf professionals as exempt from the FLSA's overtime provisions based on Section 7(i.)