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# DOL Opinion Letter Clarifies One-Month Representative Period under Section 7(i) Overtime Exemption for Retail and Service Industry Employees

On September 10, 2019, the U.S. Department of Labor (DOL) issued a new [Opinion Letter](#) providing clarity on the Fair Labor Standards Act's (FLSA)'s Section 7(i) retail or service establishment overtime pay exemption that commissions on goods or services represent more than half an employee's compensation for a representative period of *not less than one month*. 

The FLSA Section 7(i) exempts a retail or service establishment employee from the FLSA's overtime requirements if:

1. the employee's regular rate of pay exceeds one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and
2. more than half the employee's total earnings in a representative period consists of commissions.

29 U.S.C. § 207(i). Unless both conditions are met, the Section 7(i) exemption is not applicable, and overtime premium pay must be paid for all time worked over 40 hours in a workweek at a rate of time and one-half the regular rate of pay.

More specifically, Section 7(i)'s exemption requires that more than half of an employee's "compensation for a representative period (not less than *one month*) must represent commissions on goods or service." 29 U.S.C. § 207(i). This is also reflected in the statute's associated regulations, which state, "The representative period for determining whether more than half of an employee's compensation represents commissions cannot, under the express terms of section 7(i), be less than 1 month." 29 C.F.R. § 779.417(c). The representative period for determining if enough commissions have been paid may be as short as one month, but must not be greater than one year.

If the employee is paid entirely by commissions, or draws and commissions, or if commissions are always greater than salary or hourly amounts paid, the-greater-than-50%-commissions condition will have been met. If the employee is not paid in this manner, the employer must separately total the employee's commissions and other compensation paid during the representative period. The total commissions paid must exceed the total of other compensation paid for this condition to be met. However, employers need to keep in mind that tips paid to service employees by customers are not considered commissions for the purposes of this exemption.

The DOL Opinion Letter provides further clarity on the representative period requirement, as the FLSA regulations do not provide any guidance on the meaning of the phrase “not less than one month.” Relying on the Supreme Court’s decision in [Encino Motorcars, LLC v. Navarro](#), the DOL clarified that, for purposes of determining whether more than half of an employee’s compensation represents commissions, the one-month requirement is fairly interpreted to mean a *calendar month* – i.e. the time from a given day of a particular month to the corresponding day of the following month. Based on this interpretation, the DOL concluded that four consecutive weekly pay periods or two consecutive biweekly pay periods does not satisfy the one-month representative period requirement. With the exception of February, four weeks from any given date of one month will necessarily fall short of the corresponding date of the next month, and thus will not satisfy the minimum one-month requirement of Section 7(i).

However, the DOL explained that six consecutive weekly pay periods or three consecutive bi-weekly pay periods may satisfy the statutory minimum period of not less than one month – i.e. one calendar month. That will be the case even if the six consecutive weeks or the three bi-weekly periods do not capture all the days in a given month.

Employers in the retail and service industry should take note of this interpretation, as it could modify the analysis to determine whether an employee is exempt from the overtime requirements. Further, the six-week period must also be “representative” and other criteria must be satisfied for the exemption to apply. Thus, in addition to reviewing, at the very least, one calendar month of the employee’s total earnings, employers also need to make sure that the employee’s regular rate of pay exceeds one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime is worked. If employers in the retail and service industry have any questions about how to properly analyze whether an employee is exempt from the FLSA’s overtime provisions, it is best to consult counsel to ensure all of Section 7(i)’s requirements have been met.