

# DOL Adopts Two Significant Changes to “Modernize” Overtime

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## First Up: DOL Expands Overtime Exemption for Commission-based Retail and Service Workers

We all know that retail has been hit hard by the pandemic. When retail employees paid on a commission basis do go back to work, fewer of them will qualify for overtime, thanks to a Department of Labor (DOL) rule promulgated on Monday, May 18, 2020. While this sounds like a bad deal for employees, there's a silver lining: the DOL issued another rule just today that will make compensating employees for staggered shifts and fluctuating workweeks easier—practices that are likely going to be critical components of a safe COVID-19 return-to-work plan in retail.

Monday's [final rule](#) withdraws 60-year-old interpretive rules that limited employers' ability to invoke Section 7(i) of the FLSA, which exempts certain commission-based employees in “retail or service establishments” from overtime eligibility. To qualify for the exemption, a business needs to show: (i) it is a retail or service establishment, as defined by the regulations; (ii) 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 (iii) more than half the employee's total earnings in a representative period must consist of commissions.

Prior to the new rule, the DOL's old interpretive rules set forth lists of businesses that either did not qualify, or only possibly qualified, as “retail or service establishments.” The first list identified businesses that were categorically excluded from the exemption because they had “no retail concept,” which included real estate companies, construction contractors, and our personal favorite, tree removal firms. The second list identified businesses that “may be recognized as retail,” which included department stores, restaurants and auto repair shops.

Commentators and courts have often criticized these archaic and seemingly arbitrary catalogues because they contained internal inconsistencies, created confusion and failed to offer any real reasoning or analysis. The DOL's new rule takes a more rationalized and consistent approach by eliminating these rigid lists and affording all businesses an equal chance at proving they are retail or service establishments and that they meet the other exemption requirements. The new rule takes into account that modern businesses are multi-faceted and may possess some retail characteristics, which would qualify them for the exemption, even if the outdated lists previously excluded them.

## Second: DOL Clarifies Additional Compensation is Compatible with Fluctuating Workweek Method of Computing Overtime

As mentioned above, the DOL likewise issued a [final rule](#) today, Wednesday, May 20, 2020, amending Section 114 of the FLSA to allow employers to pay bonuses or other incentive-based pay

to salaried, nonexempt employees with varying workweek schedules. The final rule clarifies that payments in addition to a fixed salary are compatible with the use of the fluctuating workweek method of calculating overtime pay under the FLSA.

The FLSA's fluctuating workweek method dictates that employees with fluctuating workweeks, and who agree to receive a fixed weekly salary that covers all hours worked, are entitled to halftime premium for hours worked in excess of 40 per week. These employees are not entitled to time and a half premium because the fixed salary covers the "straight-time" component of pay for the hours worked over 40. However, Section 114's requirement of a "fixed salary" has led to confusion over whether additional compensation, such as commission or bonuses, are compatible with Section 114's method of pay.

The new rule amends Section 114 to clarify that employers are able to provide additional pay to fluctuating workweek employees beyond the "fixed salary," including commissions, bonuses, premium payments and hazard pay. Such additional compensation must nevertheless be included in the regular rate of pay, unless otherwise excluded under the regulations.

The DOL's stated purpose in amending the overtime rules is to "allow employers and employees to better utilize flexible work schedules." Flexible schedules are imperative in the modern workforce. This becomes a particularly acute need given the COVID-19 crisis, when staggered shifts will form part of the inevitable solution to reducing employee "density" at work (code for social distancing at work). The new rule allows employers and employees to agree to these flexible schedules, while still guaranteeing that employees have access to bonuses and other incentive-based pay provided to them by their employers.