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Payment of Exempt Commissioned Employees (Part 2 of 2)

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Exempt employees can be paid on a commission basis. An exempt employee is one whose employer does not have to comply with the regulations of the federal Fair Labor Standards Act ("FLSA") and certain state wage and hour laws. Outside sales employees are generally exempt from minimum wage and overtime regulations under the FLSA and state laws. Inside salespeople (those who work at the employer's place of business) are usually non-exempt unless they qualify under the retail/service establishment commission rules under Section 7(i) of the FLSA.

Employers must still pay exempt commissioned employees in accordance with New Jersey's Wage Payment Law ("NJWPL"). A 2025 case, Musker v. Suuchi, Inc., decided by New Jersey's Supreme Court confirmed that commissions are considered wages. Thus, New Jersey employers must adhere to the NJWPL's requirements as to when and how wages should be paid and which deductions can be taken from employee commissions for both exempt and non-exempt commissioned employees.

Outside Sales Exemption

Under the FLSA, outside sales employees are those who primarily make sales away from their employer's place of business. The outside sales exemption also includes those who obtain contracts and orders for services or for use of facilities for which the client or customer will pay. Drivers who deliver products and sell products may qualify as exempt outside salespeople if their primary duty is to make sales.

Section 7(i) Exemption for Retail or Service Employees Paid Commissions

- Retail or service employees may be exempt from overtime under Section 7(i) of the FLSA if all three of the following conditions are met: The employee must be employed by a retail or service establishment (defined as a business that primarily sells goods or services to the public and not for resale and does not manufacture goods).
- The employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked.
- More than half the employee's total earnings in a representative period (not less than one month) must consist of commissions.

If the employee is paid entirely by commissions, or draws and commissions, or if commissions are always greater than salary or hourly amounts paid, then at least half of the employee's total earnings are commissions, and the third requirement will have been met.

As is always the case with wage and hour law, there are many employment situations which may make it difficult to determine whether the Section 7(i) test applies to employees. There are further regulations that instruct on how to determine whether an establishment is a retail or service establishment and how to calculate a representative period which make paying commissioned exempt employees tricky.

If you are an employer who needs assistance regarding whether your commissioned employees are exempt under the FLSA, state wage and hour laws or any other employment law, please contact Stephanie Gironda or any member of the Wilentz Employment Law Team.

Attorney

- Stephanie D. Gironda

Practice

- Employment Law