



## Legal Alert: Following the 2011 Appropriations Bill, Dealerships Face An Uncertain Future With Regard to Exempt Employees

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**Executive Summary:** On December 23, 2011, President Obama signed the nearly \$1 trillion omnibus spending act (H.R. 2055) into law, which provides \$14.5 billion to the United States Department of Labor ("DOL") for fiscal year 2012. In addition to providing funding, the law places certain restrictions on actions by the DOL. Specifically, the act includes a rider in Section 113 which bars the use of funds to enforce Fair Labor Standards Act ("FLSA") regulation 29 C.F.R. § 779.372(c)(4). Section 779.372(c)(4) originally provided that a service manager, service writer, service advisor, or service salesman at an automobile dealership, who is not primarily engaged in the work of a salesman, partsman, or mechanic is **not exempt** under section 13(b)(10)(A). Section 779.372(c)(4) was deleted from the regulations in April 2011. Because § 779.372(c)(4) is no longer part of the final regulations, the rider appears unenforceable.

### Background Information

Section 13(b)(10)(A) of the FLSA provides that "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a non-manufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers" shall be exempt from overtime requirements. On July 28, 2008, during the Bush administration, the DOL published a notice of proposed rulemaking ("NPRM") containing several revisions to the FLSA regulations, including revision of § 779.372(c)(4) to clarify that service advisors **qualify** for the overtime exemption.

The proposed revision of § 779.372(c)(4) was not adopted as a final rule in 2008, however. Rather, the final FLSA regulations were not published until April 5, 2011, by the Obama administration. The Obama-administration DOL declined to adopt the proposed change to § 779.372(c)(4) and reverted back to its position that service managers, service writers, service advisors, or service salesmen do not qualify for overtime exemptions, as previously set forth in § 779.372.

While the preamble to the final regulation suggests that the entirety of subsection (c), including subsection (c)(4), would remain the same and not be revised, subsection (c)(4) is noticeably absent from the final regulations. At this time it is unclear whether the deletion was inadvertent or whether the

DOL purposefully deleted (c)(4) because it believed the remaining sections of § 779.372 were sufficient to address whether service managers, service writers, service advisors, or service salesmen are exempt.

### **The 2011 Appropriations Bill**

Following publication of the final regulations in April 2011, on December 23, 2011, President Obama signed H.R. 2055 into law, including Section 113, which bars the use of funds to enforce § 779.372(c)(4). Because § 779.372(c)(4) is no longer part of the final regulations, it is unclear what the rider accomplishes and whether the DOL will adhere to the spirit of the appropriations bill rider and refuse to enforce overtime violations with regard to service managers, service writers, service advisors, or service salesmen. Because § 779.372(c)(4) is no longer part of the final regulations, the DOL would not appear to commit a technical violation of the appropriations bill if it were to enforce its position that service managers, service writers, service advisors, or service salesmen are non-exempt.

### **Employers' Bottom Line**

Given the uncertainty of the effect of Section 113 of the appropriations bill on DOL enforcement with regard to service managers, service writers, service advisors, or service salesmen, the safest course of action for employers is **not** to treat these employees as exempt under section 13(b)(10)(A). However, to the extent the employees are paid on a commission basis and certain other conditions are met, they may be otherwise exempt under section 207(i) of the FLSA, which provides an overtime exemption for employees of a retail establishment who are paid on a commission basis. It is important to note that some state laws do not recognize an overtime exemption for commissionable sales employees. Therefore, it is always important to consult with both state and federal law prior to making use of an overtime exemption.

If you have any questions about the issues addressed in this Alert, including proper use of the 7(i) exemption, please contact the author, David Prather, [dprather@fordharrison.com](mailto:dprather@fordharrison.com), a partner in our Memphis office, or the Ford & Harrison attorney with whom you usually work.