A. Introduction

The purpose of these materials is to provide a general overview of the recent developments with regard to exemptions under the Fair Labor Standards Act, 29 USC § 201, et seq., as they relate to retail and service commission plans under Section 7(i) of the Act, computer technicians and retail sales executives. Each section is similarly organized – the basics of the exemptions are addressed first and the recent case law developments (if any) are addressed thereafter.

B. § 7(i) Exemption - Retail and Service Establishment Commission Plans

1. The Basics of the Exemption

Section 7(i) of the FLSA exempts from the Act’s overtime requirements certain employees of retail or service establishments who are paid on a commission basis.

If a retail or service employer elects to use the Section 7(i) overtime exemption for commissioned employees, three conditions must be met:

- the employee must be employed by a retail or service establishment, and
- 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, and
- more than half the employee’s total earnings in a representative period must consist of commissions. 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. The employer must select a representative period in order to determine if this condition has been met.

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

The two issues which continue to be raised involve whether the establishment is retail or service and whether the compensation plan is a true commission plan.
2. Retail or Service Establishments

Section 7(i) does not define the term “retail or service establishment”—instead, the courts and the DOL have relied on the definition of “retail or service establishment” contained in the now repealed Section 13(a)(2) to construe the scope of Section 7(i). Before its repeal in 1989, Section 13(a)(2) of the FLSA exempted employees of “retail or service establishment[s]” from the Act’s minimum wage and overtime pay requirements. Despite the repeal of Section 13(a)(2), the regulations that interpret the “retail or service establishment” exemption have remained in place. Since the DOL did not eliminate the regulations, the Act’s former definition of a “retail or service establishment” is useful in giving meaning to the other references to that term that remain in the FLSA. Therefore, the regulations and case law that interpret the term “retail or service establishment” still warrant consideration in this section.

a. Regulations

The regulations go into great detail to define what is, what is not and the characteristics of a retail or service establishment. 29 C.F.R. §779.316-321 The regulations state:

the term ‘retail or service establishment’ … does not encompass … industries lacking a ‘retail concept.’

The regulations then go on to provide a partial list of establishments which lack the “retail concept” as well as a partial list of establishments whose sales and services may be recognized as retail. The regulations also give guidance by providing characteristics of retail or service establishments. These characteristics include the following: (a) sells goods or services to the general public; (b) serves the everyday needs of the community in which it is located; (c) performs a function at the very end of the stream of distribution; and (d) does not take part in manufacturing.

b. Case Law

Despite the extensive regulations, there has been litigation over the question of whether certain concepts could be considered a “retail or service establishment”.

Whether or not “Trade Schools” were retail or service establishments was addressed in Martin v. Refrigeration School, 968 F.2d 3 (9th Cir. 1992) The Court opined that “[s]pecialized schools such as professional and graduate institutions are not [retail establishments] because their role in the community is to produce graduates who are able to serve society’s needs. The latter is more analogous to the ‘manufacturing’ than the ‘retail’ concept.”

Applying the teachings but not the holding of Martin v Refrigeration School, Inc., the court in Viciedo v. New Horizons Computer Learning Center of Columbus, LTD, 246 F.Supp.2d 886 (S.D.Ohio 2003) found that a company which was engaged in the sale of computer software training services was a retail or service establishment because the education it provided serves the everyday needs of the community. Relying on Martin, the court rejected plaintiffs’ position
that New Horizon cannot be a retail or service establishment because it is a school, and the
service it supplies is education.

An in-home carpet cleaning business was also found to be a retail or service
establishment in *Reich v. Delcorp, Inc.*, 3 F.3d 1181 (8th Cir. 1993). The Secretary of Labor
alleged that an in-home carpet cleaning business is a member of the laundry industry and thus, as
a matter of law, cannot qualify as a retail or service establishment. The district court denied the
Secretary’s motion for summary judgment, and the Eighth Circuit affirmed, holding that the
repeal of Section 13(a)(2) did not repeal the administrative and judicial construction of the retail
or service establishment exemption as it appears in Section 7(i). The Eighth Circuit wrote:
“Absent specific Congressional intent, we will not conclude that Congress retained the term
‘retail or service establishment’ in Sec. 207(i) yet at the same time discarded thirty years of
established meaning[\text{\textsuperscript{[]}}]” acquired through interpretation of Section 13(a)(2). Relying on the
definition of “retail or service establishment” that existed in Section 13(a)(2) before its repeal,
the court found that the employer met the relevant criteria to qualify as a “retail or service
establishment.” The court recognized that the 1966 Amendments to the FLSA extended FLSA
coverage to laundries and specifically excluded laundries from the Section 13(a)(2) definition of
retail and service establishments, but it concluded that, while Congress clearly manifested an
intent to prevent laundries from qualifying for the Section 13(a)(2) exemption, it did not
demonstrate an intent to prevent laundries from qualifying under Section 7(i). According to the
court, the fact that a business was not a retail or service establishment under Section 13(a)(2) did
not preclude it from being an exempt retail or service establishment under Section 7(i).

*Gieg v DDR, Inc.*, 407 F.3d 1038 (9th Cir. 2005) involved the question of whether finance
and insurance managers employed by retail automobile dealerships that sold and leased new and
used vehicles were exempt under Section 7(i). The Regulation requires an establishment to show
that 75% of its annual dollar volume of sales of goods or services is not for resale. In this case,
the dealership could only meet that requirement if it counted transactions which included long
term leases. The court held that individual automobile leases were “sales” that are not “for
resale”. Specifically, the court found that an automobile lease is not a sale for the purpose of
resale as contemplated by the FLSA because neither the dealer nor the customer enters into a
lease with the expectation that the vehicle will be promptly resold.

*Gieg v. DDR*, also addressed the issue of whether the § 7(i) exemption is limited to
employees who earn commissions on retail goods or services or whether it is meant to apply all
commission-earning employees of a retail or service establishment who meet the compensation
requirements. The court held that since the finance and insurance managers employed by a retail
automobile dealership which sold and leased new and used vehicles were employed in the work
of the exempt establishment itself, as opposed to a distinct business, that they were exempt
because the § 7(i) applies to any employee of a retail or service establishment as long the other
criteria are met.

Addressing the same issue in an opinion letter dated March 17, 2003, just three days after
the district court *Gieg* decision, the Wage-Hour Administrator determined that a finance and
insurance (F&I) salesperson employed by a retail automobile dealership was an exempt
employee under Section 207(i) of the FLSA.
In an opinion letter dated June 23, 2006, the Department of Labor addressed the applicability of the Section 7(i) retail and service exemption to employees of plumbing franchises who provide plumbing repair services and sell plumbing-related products to residential and commercial customers. At issue was whether the plumbing franchises provided services with the requisite “retail” concept under Section 7(i). The Department noted that unlike plumbing contractors, which lack a retail concept, “companies that provide general repair services for the public (such as auto repair shops, household refrigerator repair shops, and clock repair shops) can qualify as retail or service establishments.” According to the Department, “[s]uch repair services may qualify under section 7(i) even when they are sometimes performed for a commercial user rather than a homeowner, so long as the commercial repair services do not require the use of specialized facilities or equipment and the services are not different services than those provided for the general consuming public.”

3. Commission Plan Requirements

a. Regulations

The regulations at 29 C.F.R. §779.413 set forth various methods of compensation that are typically applied in a retail or service establishment: (1) straight salary or hourly rate, (2) salary plus commission, (3) quota bonus, (4) straight commission without “advances” or “draws,” and (5) straight commission with “advances” or “draws.”

Moreover, although it is typical in retail or service establishments that commission payments are tied to sales, the requirement of Section 7(i)—that more than half of an employee’s compensation represent commissions “on goods and services”—would include “all types of commissions customarily based on the goods or services which the establishment sells, and not exclusively those measured by ‘sales’ of these goods or services.” Id., see also, §779.413(b).

The regulations at §779.416 define what compensation “represents commissions.” A determination as to whether or to what extent periodic payments (i.e., draws or advances) can be considered to represent commissions is determined on a case-by-case basis. Id. In Mechmet v. Four Seasons Hotel, 825 F.2d 1173, (7th Cir. 1987) the Seventh Circuit held that percentage service charges, which hotels and restaurants characteristically add to banquet bills to compensate waiters over and above their regular hourly wages, were commissions.

b. Case Law

Both the Eleventh and Seventh Circuits have addressed the issue of what is a “commission” in the automobile repair industry. In Yi v. Sterling Collision Centers, Inc., 2006 WL 1444897 (N.D. Ill. May 17, 2006), aff’d, 480 F.3d 505 (7th Cir. 2007) the court held an incentive pay system to qualify as a commission. There, the technicians were paid an hourly rate for their actual work hours and they also received incentive pay if they completed repair jobs in less time than specified on estimates. The court concluded that “a system that increases compensation based in large measure on results is the essence of this elusive concept called commission.” Id.; but see Viciedo v New Horizons Computer Learning Center Of Columbus, LTD., 246 F.Supp.2d 886, 894 (S.D. Ohio 2003) (holding that the non-recoverable draw does not represent commissions and could not be taken in to account when determining whether more
than fifty percent of the employees’ earnings represent commission as required to qualify for the retail-service exemption).

In an opinion letter issued on November 14, 2005, the administrator provided guidance on how the division evaluates payment plans to determine whether they meet the exemption requirements.¹ “A commission rate is not bona fide if the formula for computing the commissions is such that the employee, in fact, always or almost always earns the same fixed amount of compensation for each workweek (as would be the case whether the computed commissions seldom or never equal or exceed the amount of the draw or the guarantee).”

In *Klinedinst v. Swift Investments, Inc.*, 260 F.3d 1251, 7 (11th Cir. 2001) plaintiff, an automobile painter was compensated on the basis of “flag hours” for each job; “flag hours” are specified for each job in a database used by insurance adjusters and auto repair shops. The employee received payment for the maximum number of flag hours, at his hourly rate, regardless of the number of actual hours worked to complete each project. The Eleventh Circuit held that the number of hours worked was not relevant to amounts paid to employees under the “flag hour” payment system and that, under this system, the plaintiff was exempt under the provisions of Section 7(i).

In contrast to the court's holding in *Yi*, the court in *Wilks v. The Pep Boys*, 11 WH Cases2d 1554 (M.D.Tenn. Sept. 26, 2006) determined that the defendant auto repair's shop’s "flat rate" system of paying its mechanics did not qualify as a § 7(i) commission plan. The court concluded that “wages paid to flat-rate employees must be at least somewhat proportional to the charges passed on to customers” in order to qualify as commissions. 11 WH Cases2d at 1568. The court determined that there was nothing that demonstrated any proportionality between the mechanics’ flat-rate wages and the charges passed on to customers, either for labor alone or for the overall task. According to the court, “[i]f flat-rate compensation and labor costs were actually correlated, as the defendant claims they are, the labor costs would fluctuate based on the amount paid to the flat-rate employee tasked with completing the job. They d[id] not. As such, it appears that the plaintiffs merely earn[ed] a predetermined amount for each task they complete[d] and that this amount [did] not fluctuate in tandem with the amount charged to the customers.” *Id.* at 1570. As a result, the court held that the mechanics’ pay was not exempt from the FLSA.

C. Computer-Related Occupations Exemption

1. The Basics of the Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;

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¹ As there were two opinion letters issued on the same day, the cite to the opinion letter referenced in this section is :FLSA2005-53, 2005 WL 3308624 (Nov. 14, 2005).
• The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field;

• The employee’s primary duty must consist of:

  a) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

  b) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

  c) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

  d) A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer professional exemption has historically been, and remains, limited to systems analysts, programmers, software engineers, and “other similarly skilled workers in the computer field.” See 29 C.F.R. §541.400(a). Employees whose work is highly dependent on, or facilitated by, computers do not fall within the exemption. See 29 C.F.R. §541.401. Therefore, a drafter or engineer, who must heavily rely on computers or computer programs to perform his or her work, but who is not primarily engaged in systems analysis or programming, is not covered by the exemption for computer professionals. The exemption is similarly inapplicable to employees engaged in the manufacture, repair, or maintenance of computer hardware and related equipment. Id.

2. Case Law²

In Bergquist v. Fidelity Information Services, 11 WH Cases2d 80 (M.D.Fla. 2005), the plaintiff was employed by the defendant as a computer programmer who was responsible for designing and programming computer programs for the defendant. The plaintiff worked, for the most part, autonomously with little supervision. According to the plaintiff, his design “would prove itself” when it was implemented and integrated into the defendant’s system. The court found that it was “clear” that the plaintiff’s position “fulfills the regulatory requirements” since he was “highly-skilled in computer systems analysis, or related work in software functions” and that his primary duty included, among other things, “the design, development or modification of computer systems.” The court also found relevant the fact that the plaintiff’s work is not routine and that he exercised control and discretion over his work.

² Since new the FLSA regulations went into effect on August 23, 2004, there have been very few developments with respect the Computer-Related Occupations Exemptions. Further, the new regulations made few changes to the pre-2004 regulations. As a result, while the cases in this section were decided under the pre-2004 regulations, they are still useful today.
In Bagwell v. Florida Broadband, LLC, 385 F. Supp. 2d 1316 (S.D. Fla. 2005), the computer professional exemption was deemed applicable to an employee responsible for developing, improving, and maintaining the company’s network system. In carrying out this duty, the plaintiff wrote specifications for wireless network topology, routers and switches used in the network, specified protocols used in the network, designed and assured proper installation of all cabling infrastructure (maintaining network availability and security), interacted with clients for level 3 support, consulted with clients for LAN design and technical specifications, interacted with vendors for pricing and availability of materials, scheduled technical field staff for surveys and installations, scheduled maintenance of the network, maintained detailed network documentation, approved site installations of infrastructure and equipment, designed and implemented LAN infrastructure, recommended purchases of equipment, and evaluated emerging technologies. See also Pellerin v. Xspedius Mgmt Co. of Shreveport LLC, 432 F. Supp. 2d 627 (W.D. La. 2006)(exemption applies to employee responsible for maintaining and supporting software applications by adding input fields, correcting bugs, and changing codes); Bobadilla v. MDRC, 2005 WL 2044938 (S.D.N.Y. Aug. 23, 2005)(network administrator was exempt); Bergquist v. Fidelity Information Services, Inc., 399 F. Supp. 2d 1320, 11 WH Cases2d 80 (M.D. Fla. 2005), aff’d, 11 WH Cases2d 1376 (11th Cir. 2006)(exemption applies to computer programmer responsible for designing programs, assisting the business analyst with technical details of computer programs, and working on a project team to design pieces of programs that would be integrated into the work of other team members were exempt in nature).

The court in Martin v. Indiana Michigan Power Co., 9 WH Cases 2d 1505 (6th Cir. 2004) was not, however, convinced that the exemption applied to the work performed by the plaintiff who was primarily responsible for “[m]aintaining the computer workstation software, troubleshooting and repairing, network documentation.” The plaintiff’s duties also included tasks such as installing software and hardware and moving work stations. After the litigation ensued, the plaintiff was assigned the duty of reviewing a Windows 2000 operating system to make sure the defendant’s internal applications worked properly within the system. The Sixth Circuit reversed the district court’s ruling that the plaintiff qualified for the exemption finding that the district court mistakenly held that the plaintiff’s “‘work require[d] highly-specialized knowledge of computers and software. . .’” 9 WH Cases 2d at 1509 (emphasis in original). Rather, the Sixth Circuit held, the proper inquiry was whether the plaintiff’s “primary duty … require[d] ‘theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering’” not merely “highly-specialized knowledge of computers and software.” Id. (emphasis in original). The Sixth Circuit ultimately held that there was arguably only one task performed by the plaintiff that would qualify for the exemption (the Windows 2000 project) and since this was not his primary duty, his position did not qualify for the exemption because his primary duties involved “[m]aintaining the computer system within … predetermined parameters.” Id. at 1510.

Similarly, in Hunter v. Sprint Corp., 11 WH Cases2d 1581 (D.D.C. 2006) the exemption was found to be inapplicable to a plaintiff who served “primarily as a customer service representative, responding to telephone inquiries from clients who were having technological difficulties with [the defendant’s] Internet services.” He was a “second-tier responder,” which meant that he fielded customer calls when the question or concern could not be handled by the first-tier responder. In this role, the plaintiff would attempt to “diagnose” and help resolve
customer problems. In many instances, the plaintiff served as a liaison between the customer and higher level technicians when the problem was not one that he could resolve. The court found that the exemption requires a “substantially higher degree of skill” than what was required of plaintiff’s position. 11 WH Cases2d at 1585-1586. Since the plaintiff appeared to “function as a technically proficient help-desk employee whose primary duty was customer service,” his position did not qualify for the exemption.

D. Executive Exemption in the Retail Setting: Litigation under the Duties Test

1. The Basics of the Exemption

To qualify for the executive exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

There are a number of hotly litigated issues under the executive exemption, including the salary basis, compensation plan, whether the executive directs the work of two or more to list a few, however, this paper deals exclusively with litigation under the primary duty test.

2. Duties Test and the Primary Duty of Managing in a Retail Setting

a. Regulations

Most “duties disputes” regarding an employee’s exempt executive status turn on whether the managerial work constitutes the employee’s primary duty. The term “primary duty” means the principal, main, major or most important duty that the employee performs. 29 C.F.R. § 541.700. Under the regulations, the percentage of time spent performing exempt work “can be a useful guide” in identifying whether exempt work is an employee’s primary duty, but it is not dispositive. See 29 C.F.R. §541.700(b) Nevertheless, an employee who spends more than 50 percent of his or her time on exempt work “will generally satisfy the primary duty requirement.” Id.

An executive employee may concurrently perform nonexempt duties, as long as the requirements of Section 541.100 are otherwise met. See 29 C.F.R. §541.106(a). The factors enumerated in Section 541.700 defining “primary duty” should guide the determination of
whether an employee meets the requirements of Section 541.100 while performing concurrent duties. The Department has recognized that:

Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.

Exempt work includes work that is “directly and closely related” to exempt work, “mean[ing] tasks that are related to exempt duties and contribute to or facilitate performance of exempt work.” 29 C.F.R. §541.702. The supervision of other employees is clearly a management duty. See 29 C.F.R. §541.102.

b. Case Law

The courts sometimes analyze the primary duty as that which is of principal importance to the employer. A more precise approach considers whether management is an executive’s most important duty. Reich v. Wyoming, 993 F.2d 739, (10th Cir. 1993) (employee’s primary duty is that which is of principal importance to employer); Donovan v. Burger King Corp., 675 F.2d 516, 521, (2d Cir. 1982) (assistant manager’s primary duty is most important duty) (referred to hereinafter as "Burger King II"). Also in Baldwin v. Trailer Inns, Inc., 266 F.3d 1104, (9th Cir. 2001), the Ninth Circuit held that managers of a recreational vehicle park qualified for the executive exemption where their “principal value to [the employer] was directing the day-to-day operations of the park even though they performed a substantial amount of manual labor.”

The fact that a company has well-defined policies and spells out an executive’s supervisory tasks in great detail does not affect the characterization of these tasks as being exempt—simply ensuring that a company’s policies are carried out constitutes the “very essence of supervisory work.” Donovan v. Burger King Corp., 672 F.2d 221, 226 (1st Cir. 1982) (step-by-step instruction manual); Mitchell v. Abercrombie & Fitch, Co., 428 F. Supp. 2d 725 (S.D. Ohio 2006) (store manager responsible for hiring and firing, scheduling, training, handling customer complaints, and ensuring compliance with a variety of policies was exempt notwithstanding that managerial duties he performed were heavily constricted by Abercrombie’s policies and by supervision from the district manager; existence of detailed policies and procedures and regular visits by regional management may circumscribe but do not eliminate discretion, enforcement of those policies by the store manager is itself a managerial function).

For a time, the case law seemed to show a trend: in the retail setting store managers and most assistant store managers were exempt despite the fact that they were doing concurrent non-exempt work and the exempt work often meant following corporate procedures. See Donovan v. Burger King Corporation, 672 F.2d 221, 226-227 (1st Cir. 1982) (referred to hereinafter as "Burger King I"); Burger King II, 675 F.2d at 520-521. After the holdings in Burger King I and Burger King II, several federal appellate and district courts throughout the country have similarly
held that retail store managers are exempt executive employees. See, e.g., Terri Jones v. Virginia Oil Co., Inc., 69 Fed. Appx. 633 (4th Cir. 2003) (per curiam) (employee was exempt executive even though she claimed to spend 75-80% of her time performing non-exempt work because management was her primary duty); Baldwin v. Trailer Inns Inc., 266 F.3d 1104 (9th Cir. 2001) (relative importance of the managerial duties supported the exemption because the managers, although claiming to have spent 90% on nonexempt work, “were in charge of making the relatively important day-to-day decisions of the facility and providing for the safety of those in the property”); Murray v. Stuckey’s, 939 F.2d 614, 618-20 (8th Cir. 1991) (managers met the primary duty test despite the fact that 65-90% of their time was spent on non-managerial tasks); see also Mitchell v. Abercrombie & Fitch Co., 2006 WL 942090 (S.D. Ohio March 31, 2006) (retail store manager who performed nearly identical functions to a non-exempt assistant manager was properly classified as exempt); Addison v. Ashland, 2006 WL 752761 (E.D. Mich. March 23, 2006) (service center managers were exempt even though they spent over 50% of their time on non-exempt tasks and reported to area managers because they ran the store’s daily operations, including hiring, firing, and stocking inventory); Roberts v. National Autotech, Inc., 192 F. Supp. 2d 672, 679 (N.D. Tex. 2002) (garage store manager had management as his primary duty even though he spent majority of time performing non-exempt duties, such as answering phones, driving customers to and from work, getting parts, and cleaning the bathroom, his primary importance was as manager of the store); Kastor v. Sam’s Wholesale Club, 131 F. Supp. 2d 862, 867 (N.D. Tex. 2001) (bakery department manager who claimed to spend 90% of his time performing non-managerial tasks was not entitled to overtime because the purpose of his employment was to manage the department in accordance with the company’s policies and procedures); Meyer v. Worsley Cos., Inc., 881 F.Supp. 1014 (E.D.N.C. 1994) (retail store manager exempt where he considered himself to be “responsible” for the store and was “in charge” of the daily operations, even though he was expected to perform the same duties of other store clerks).

By 2007, it seemed that the courts were breathing new life into the question of whether store managers and assistant managers were exempt under the executive exemption. While the courts continue to rely on the Burger King cases in divining whether retail store managers and assistant managers are eligible for the executive exemption, they are coming up with different conclusions. In Thomas v. Speedway SuperAmerica, LLC, 506 F.3d 496, (6th Cir. 2007), the Sixth Circuit concluded that the manager of a gas station/convenience store was properly classified as an exempt executive. The court determined that the plaintiff’s exempt managerial duties, such as hiring, scheduling and training employees, “were much more important to Speedway’s success than her non-managerial duties,” and observed that although the district manager “remained constantly available to his store managers” he did not “maintain[] constant contact with or supervision over the store managers via telecommunications.” Also of significance to the court was the fact that the plaintiff was the most senior employee at the station, and she was eligible to participate in a store manager bonus program.

In Velazquez-Fernandez v. NCE Foods, Inc., 476 F.3d 6, 12 (1st Cir. 2007) the First Circuit held that a warehouse general manager qualified for the executive exemption notwithstanding that he performed certain clerical and non-manual tasks, reasoning that “he was the most senior employee at the warehouse, and was ‘in charge of the warehouse, and everything

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that dealt with the warehouse, purchase, sales, dispatch, reporting, everything that the warehouse
tailed.”

In *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233 (11th Cir. 2008), however, the
Eleventh Circuit squarely rejected the employer’s contention that because the store managers in
question were “in charge” of the store, they were necessarily exempt as a matter of law. The Court
of Appeals emphasized that “[i]n answering the primary duty inquiry, courts do not ‘simply slap on
a talismanic phrase,’” and expressed the view that “Family Dollar’s ‘in charge’ label strikes us as a
way to bypass a meaningful application of the fact-intensive factors.”

In *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259 (11th Cir. 2008), the Eleventh
Circuit refused to overturn a jury’s determination that store managers employed by a drive-
through grocery chain were misclassified as exempt employees. The court found ample evidence
supportive of the jury’s finding, including testimony indicating that during most weeks the
plaintiffs spent little or no time performing managerial duties, the stores were actually run by
district managers from whom the store managers need to procure permission in order to
implement any sort of managerial decision.

In contrast to the *Morgan* and *Rodriguez* cases, the court in *Mims v. Starbucks Corp.*, 2007 WL 10369 (S.D.Tex.2007) entered summary judgment in favor of Starbucks finding that
the store managers met the requirements of the executive exemption even while concluding that
the store managers spent a large part of their time engaging in non-exempt work (i.e. making
coffee drinks). The *Mims* court found that the plaintiffs’ “significant managerial functions - such
as ordering and controlling inventory; deciding whom to interview and hire for barista positions;
training and scheduling employees; special marketing promotions; and monitoring labor costs -
were critical to the successes of their respective stores.” 2007 WL 10369 at *6. The court's
conclusion was also supported by its findings that the plaintiffs had enough discretion and
freedom from supervision and made nearly twice as much as the next highest paid employee
such that the exemption applied.

As these and numerous other cases illustrate, the determination of whether a retail
manager qualifies for the executive exemption is highly fact-specific and requires a probing
case-by-case analysis.