Do I Have to Pay Overtime? The Fair Labor Standards Act and the Financial Services Industry

09.05.2012
09.05.2012

I. Introduction

The number of Fair Labor Standards Act ("FLSA") lawsuits continues to increase with no signs of slowing down. In the annual reporting period ending March 31, 2012, a record-high 7,064 FLSA lawsuits were filed in federal court. Although these FLSA lawsuits cut across a whole spectrum of industries, traditionally white-collar industries, such as the financial services industry, have experienced a dramatic increase in wage and hour compensation cases. This dramatic increase in FLSA lawsuits should raise a warning flag for financial services employers. Financial services employers need to be aware that actual job duties, rather than job titles, determine whether employees are entitled to overtime. Thus, although employees in this industry have titles such as "officers," "analysts," brokers," and specialists," which indicate that they generally perform non-manual, technical or analytical work, these employees may not actually fall within one of the FLSA exemptions to overtime.

II. The FLSA "Administrative Exemption"

The issue of whether a financial services employee is exempt from overtime generally turns on an analysis of the "administrative" exemption. For an employee to fall within the "administrative" exemption under the FLSA:

1) the employee's primary duties must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers (the "Work Test");
2) the employee's primary duties must involve the exercise of discretion and independent judgment concerning matters of significance (the "Discretion Test"); and
3) the employee must be paid on a salary or fee basis at not less than $455 per week (the "Salary Basis Test").

All three requirements must be met for an employee to be exempt from overtime.

A. The Salary Basis Test

Although at first glance the Salary Basis Test appears to be relatively straightforward, employers often disregard the requirement that employees *must be guaranteed* a minimum weekly salary in order to be considered exempt. Particularly, financial services employers that pay their employees on a commission basis must be careful to meet the minimum weekly compensation requirement; otherwise, the exemption is lost automatically, regardless of the duties that the employees perform, and regardless of the amount of commissions that the employees receive over time.

For example, in *Takacs v. A.G.Edwards & Sons, Inc.*, 444 F. Supp. 2d 1100 (S.D. Cal. 2006), the court held that financial

consultants did not meet the Salary Basis Test where their monthly draw was considered a "loan" against future commissions rather than a guaranteed salary. On the other hand, in *Havey v. Homebound Mortg., Inc.*, 547 F.3d 158 (2d Cir. 2008), the court held that a mortgage underwriter was paid on a salary basis where she received a guaranteed base salary, along with additional compensation for processing more loans subject to a reduction for defects in the work. The court reasoned that, although the employee's pay was subject to reduction based on the quality of her work, she was always guaranteed enough pay to meet the Salary Basis Test.

B. The Work Test

Under applicable Department of Labor regulations, duties such as collecting and analyzing information regarding clients' finances; determining which financial products best meet clients' needs and circumstances; advising clients about the advantages/disadvantages of different financial products, and marketing, servicing, or promoting the employer's financial products are considered "administrative" work. Employees whose primary duty is selling financial products, however, do not qualify for the "administrative" exemption. Thus, employees will often argue that they are not exempt from overtime because their duties include cold-calling potential clients, closing sales, and processing paperwork for transactions.

For example, in *Wong v. HSBC Mortg., Inc.*, 2008 U.S. Dist. LEXIS 21729 (N.D. Cal. 2008), the court held that loan officers did not meet the Work Test where undisputed deposition testimony revealed that their primary duty was selling various types of loans, mortgages, and other financial products. On the other hand, in *Hein v. PNC Fin. Servs. Group,* 511 F. Supp. 2d 563 (E.D. Pa. 2007), the court held that, although the employee made cold calls to potential clients and closed sales, his primary duties consisted of collecting and analyzing customer information and decision-making concerning sales and investments. Thus, the employee in *Hein* fell under the "administrative" exemption. The fact-specific nature of the Work Test underscores the need for employers to undertake a close review of the actual work performed by employees to determine whether their primary duties fall within the "administrative" exemption.

C. The Discretion Test

The Discretion Test focuses on whether employees possess discretionary authority with respect to how they perform their duties. In addition, the Discretion Test requires employees to exercise their judgment in matters of significance to the employer. In seeking overtime pay, employees will argue that they possess no discretionary authority because they are required to follow specific guidelines in making their decisions and cannot deviate from those guidelines.

In *Whalen v. JP Morgan Chase & Co.,* 569 F. Supp. 2d 327 (W.D.N.Y. 2008), the court found that underwriters exercised sufficient discretion and independent judgment to be exempt from FLSA overtime requirements. In that case, the underwriters analyzed and rendered individualized decisions for loans up to $500,000; the underwriters considered customers' explanations for variations in their credit history and made the ultimate decision on whether to approve a loan. In contrast, in *DiFilippo v. Barclays Capital, Inc.*, 552 F. Supp. 2d 417 (S.D.N.Y. 2008), the court declined to grant summary judgment in favor of the employer where "government clearance analysts" alleged that their jobs involved no discretion whatsoever; rather than exercise independent judgment, the plaintiffs in *DiFilippo* allegedly just ran reports, processed coupons, and prepared wire transmissions—they did not make any decisions that bound their employer on any "matter of significance." As with the Work Test, the Discretion Test involves a fact-specific analysis.

III. Conclusion

Employers in the financial services industry need to be aware of the requirements of the FLSA "administrative" exemption because the stakes could not be higher. Not only has the number of lawsuits increased dramatically, but the Department of Labor has also stepped up enforcement. For instance, companies including Citigroup, UBS, and Morgan Stanley have paid as much as $98 million dollars to settle FLSA lawsuits with their employees.

In response to the increase in FLSA litigation in the financial services industry, employers must take steps to minimize their risk. First and foremost, employers must compare job descriptions with actual job responsibilities to ensure that a factual basis for claiming an FLSA exemption exists. In addition, employers must determine whether those actual job duties are truly administrative and involve independent judgment and discretion. Finally, employers who pay their employees on a commission basis must review their compensation practices to ensure that the FLSA exemption is not

lost due to lack of a guaranteed minimum income. With no signs that FLSA lawsuits are slowing down, financial service employers should move quickly to ensure their compliance with the law.

Related People

- David C. Burton – 757.473.5354 – dburton@williamsmullen.com

Related Services

- Labor, Employment & Immigration