

KULT: Mortgage loan officers punch the clock under new rule

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VOICES FROM THE INDUSTRY
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A letter issued by the U.S. Department of Labor is certain to add to the recent surge in wage and hour litigation involving financial services firms. The letter concluded that employees who perform typical job duties of a mortgage loan officer do not qualify as administrative employees exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act.

In other words, the government now views loan officers more like factory workers than white-collar business managers.

If the expanding body of case law is any indication of things to come, the exempt status of several positions within the financial services industry will undergo challenge for years.

The letter, which appears at odds with the department's own regulations and its previous interpretations of those regulations, may create lots of unanticipated liability. Employers that violate the act face orders to pay unpaid wages, penalties, attorney's fees, collective actions, and individual liability for executives and officers.

To be an exempt administrative employee, one must be paid a salary and primarily perform office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.

The exemption does not apply to employees whose primary duty is producing the goods or services their employer offers in the marketplace.

According to Labor Department regulations, in financial services, employees generally are exempt if they collect and analyze information regarding the customer's income, assets, investments or debts; determine which financial products best meet the customer's needs and financial circumstances; advise the customer about the advantages and disadvantages of different financial products; and market, service or promote the employer's financial products.

However, an employee whose primary duty is selling financial products does not qualify for the exemption.

Based on these regulations, employers may have reasonably concluded that a typical mortgage loan officer meets the duties test for the exemption. Indeed, in 2006, the department issued a letter concluding that the exemption applied to mortgage loan officers who service individuals seeking a loan for a home.

However, in this year's letter, the department concluded that the typical mortgage loan officer does not

primarily perform office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. The primary duty, rather, is selling.

So what's the big deal? After all, the law evolves. It is not uncommon for judges to interpret various laws differently over time. Indeed, most labor lawyers are familiar with the National Labor Relations Board changing its position on key issues depending on which political party happens to occupy the White House.

The Fair Labor Standards Act is different. Improperly classifying an employee as exempt from the act's minimum wage and overtime requirements may result in double the amount of unpaid overtime for two and possibly three years.

To make matters worse, cases involving the act often are brought as class actions. Certain officers and managers may be sued individually, and wage and hour claims often are excluded from coverage under Employer Practices Liability Insurance policies.

With such substantial liability at stake (liability that an employer arguably could not have anticipated) it seems to me the Department of Labor should have implemented a more formal process of amending the regulations, with input from employers, rather than changing its position via the letter.

Nevertheless, the letter likely will play a role in pending and future court cases, and will guide Labor Department investigators during future audits. •

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