

Lawsuits Against Banks Proliferate over Employee Pay

Sep 13, 2009 | See More in: [Litigation](#)

Share this article:  [E-mail](#)  [Print](#)  [Share](#)

Hundreds of banks and other financial institutions may be sued for overtime pay by staff they have misclassified as "exempt" professionals. The issue has manifested itself into hundreds of lawsuits since a 2004 revision of federal wage and hour regulations, including a new class action filing against Franklin First Financial, the national mortgage broker based in Melville, N.Y. Banks similarly are vulnerable.

There has been a "wholesale misclassification of employees in this industry" as exempt from overtime pay, warns attorney Mark Tabakman, a partner with Fox Rothschild in the firm's Roseland, N.J., office, who has defended many class actions and says they're proliferating. "There have been hundreds of these cases. Anecdotally, there is not a week that goes by that there is not a report of a financial services employer being sued in such a class action" by loan officers, loan originators, mortgage brokers and similar titles.

The rules about how to classify employees who work more than 40 hours in a week are contained in the federal Fair Labor Standards Act (FLSA), as well as in state laws. One common mistake: Employees are not able to waive their rights under the law, even if they perceive that being classified exempt from overtime is beneficial, says attorney Jim Zouras, a partner in the Chicago law firm of Stephan Zouras LLP.

The [Sexton v. Franklin First Financial Ltd. suit](#) involves Franklin employees who sold residential mortgages out of its offices in New York and elsewhere since December 2002. (The statute of limitations is three years under FLSA, but it is six years in New York.) The question is whether mortgage brokers - who were paid primarily on commission - are entitled to minimum wage and overtime compensation like hourly workers.

The federal suit, filed in the Eastern District of New York, claims Franklin misclassified the loan officers as exempt, failed to keep accurate time records and failed to pay them overtime (time and a half). Although the plaintiff, Matthew Sexton, sued individually for overtime pay, a federal judge has granted conditional class action status for hundreds of office-based Franklin loan officers in the region. Loan officers who work outside its New York offices could be added later. First Financial denies the allegations in court papers, countering that Sexton is an exempt employee.

"For whatever reason, a lot of entities like Franklin First elected to pay their loan officers on a commission-only basis," says Zouras, Sexton's attorney. "That type of pay plan might be appropriate for loan officers [who make sales calls from] outside the office. But the law says very clearly that if you primarily work inside an office, you must be paid a guaranteed minimum wage and overtime. Franklin First - along with dozens and dozens of mortgage companies - did not follow that law."

In many similar FLSA lawsuits filed against banks, mortgage companies and brokerage houses, the institution paid a salary against which future earned commissions were subtracted, says Zouras, whose firm concentrates on in FLSA actions. "If the compensation isn't really free and clear, I would be very careful with those plans," which address neither minimum wage nor overtime laws, he says.

"Anytime you've got an employee paid on a commission-only basis, bells should go off," Zouras says. "There are ways to do it properly, but the law is intricate. With any job that resembles sales, I would recommend extreme caution. The penalties are very serious," generally including payment of unpaid wages, double damages and both your and the plaintiff's attorneys' fees. Individuals can be sued, too. "You can't hide behind the corporation," he says.

Most wage and hour cases are settled out of court, with the financial institution paying fairly large sums rather than "roll the dice" with a jury, Tabakman says. Otherwise, cases take one to three years to go to trial, usually with murky facts that risk "million dollar liability, without exaggerating," he says.

How Banks can Avoid Wage & Hour Violations

Banks and other financial institutions should conduct regular internal audits of each individual salaried position - actual duties, not job description - to determine if it is properly classified as exempt, Tabakman says.

"This scrutiny must focus on the regulatory definition of exemption for financial services people," he says. Since loan officers, loan originators and mortgage brokers typically don't supervise more than one person and usually don't fall under the definition of "professionals" - FLSA classifies supervisors and professionals as exempt - the only other applicable white collar exemption is the "administrative exemption."

That's a tough one to prove and typically gets attacked in bank cases, Tabakman says. The administrative exemption requires that the employee:

- (a) Primarily performs office work - not sales - related to management or general business operations (including marketing, promotion and business operations),
- (b) Exercises "discretion and independent judgment" on significant matters by making decisions or recommendations as opposed to using "skill and experience" in applying existing standards, and
- (c) Be paid a salary of no less than \$455 per week under the FLSA.

In financial services, the employee is considered exempt if the primary duty is analysis of customers' financial situations in order to recommend financial products, Tabakman says, citing a 2004 revision to FLSA Part 541. But even this is murky because the analysis, which is exempt work, typically is done to set-up a sale, which is not exempt. If sales turns out to be more than 50% of that job, but you classify the employee as exempt and he or she works overtime, you are vulnerable.

This is a "perfect storm of bad news for an employer trying to defend an action," Tabakman says: highly paid employees working long hours in arguably non-exempt jobs.

One danger for banks is that because they are "extraordinarily regulated," discretion and independent judgment may not come into play because loan officers and others are governed by compliance regs, as well as credit scores and bank policies, Tabakman says. Excessive reliance on manuals could lead to the perception that the employee is "merely looking up the answer" - a skill that does not entail discretion.

Result: Banks are misclassifying "in a wholesale manner those kinds of folks as exempt from overtime," Tabakman says. "Many of these employees are making pretty high salaries - \$50,000, \$100,000 per/year. Con-commitment to that, you have people working 45, 50 hours or more. So you have the potential for a big liability."

The liability grows if the case moves to class action status - "the horrible danger for the employer community" - particularly if it, for instance, comprises every loan originator in the country for a money center bank, Tabakman adds. "It just takes one. It drives up the stakes geometrically... You have the possibility of just a mess."

Careful: Just because you pay an employee a salary does not absolve you from paying overtime, Zouras warns. "It still goes back to the duties the individual is performing," he says, citing a janitor who is paid an annual salary of \$35,000. "You can't say he has to work 70 hours per week without overtime."

Also, someone who originally was accurately classified as exempt may have his duties change in a way that makes them non-exempt, perhaps because they no longer supervise staff, Tabakman says. Banking is particularly difficult because of gradations in responsibilities. Junior brokers may be non-exempt because they rely on standardized guidebooks to make sales, but senior brokers who use discretion are exempt.

Banks and other financial institutions are best off conducting regular audits, Zouras says: "An ounce of prevention equals a gold mine of cure."