



Mortgage Banking Employment Class Actions

MBA's Legal Issues and Regulatory Compliance
Conference

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1. Trends
2. Focus Issues
3. Compliance

This presentation provides a descriptive overview, and it is not intended to state a position on the claims or defenses in cases discussed in this presentation.

Wage and Hour Class and Collective Actions

- Cases filed against at least 30 mortgage banking companies in the last 12 months
- Federal overtime and minimum wage claims under the Fair Labor Standards Act (FLSA)
- State law claims: overtime, minimum wage, timely wage payment, meal periods

Wage and Hour Class and Collective Actions

- Federal claims: “opt-in” collective actions under the Fair Labor Standards Act
- State claims: “opt-out” class actions under state statutes and common law theories
- Multi-state coverage: covering employees/former employees in multiple locations and states

“Stock drop” cases

- Employer which offers company stock as an investment option in the 401(k) plan
- ERISA class action filed after the stock price drops following adverse disclosures or news
- Claims: plan fiduciaries should have removed or limited participant investment in company stock

Bankruptcy issues, WARN Act claims

Mortgage loan officers: overtime and minimum wage

- Overtime: “time and a half” overtime premium applied to the “regular rate”
- Minimum wage:
 - Focus area: commission-only loan officers who are not paid at least the minimum wage ***weekly***
 - Possibility of “spreading” over one month or possibly longer periods

Mortgage loan officers: Outside sales exemption

- Commission-only permitted (does not require salary minimum)
- Wage and Hour Administrator Opinion FLSA 2006-11 (March 31, 2006)
- Loan officer who works “outside” to develop leads and works “inside” on loans from those leads *v.*
- Loan officer who works “outside” to develop leads and works “inside” on loans from leads developed by others

Mortgage loan officers: Administrative exemption

- Requires minimum salary (\$23,660 federal) paid on a salary basis, usually combined with commission structure
- Regulations: 29 C.F.R. § 541.203(b)
- Wage and Hour Administrator Opinion FLSA 2006-31 (September 8, 2006), issued to MBA

Mortgage loan officers: Administrative exemption

- Use of technology (Desktop Underwriter, Loan Prospector, etc.) consistent with the discretion and independent judgment test
- Exempt duties: gathering information from customers, analyzing and evaluating that information, making recommendations, marketing

Mortgage loan officers: Administrative exemption

- Inapplicable where primary duty is “sales”
- “Sales” v. “marketing”
- Wage and Hour Administrator opinion recognizes that an exempt loan officer may engage in some sales – customer specific persuasive sales activity

Prospects for the cases

Mortgage loan officers: Retail/service establishment sales exemption

- Do mortgage banks qualify as retail or service establishments for purposes of this exemption?
Legislative and regulatory history
- *Gatto v. Mortgage Specialists of Ill.* (N.D. Ill. 2006): exemption applied to mortgage **brokers**

Exempt status of other personnel

- “Producing” manager of a small branch, who supervises branch employees but also remains responsible for her own loan production
- Executive exemption:
 - Primary duty
 - Salary basis/salary minimum
 - Supervises two or more FTE employees

Exempt status of other personnel

- Underwriters
- Appraisers
- Loan processors

Call centers – non-exempt employees

- Allegations that work required before and after the scheduled shift period, but not included in compensable time/overtime

Litigation issues

- Statute of limitations – FLSA: 2 years v. 3 years. States: several that range from 4-6 years
- Class certification: differences among business models, locations, positions
- Discovery of electronically stored information (e.g, archived emails)
- Communications with employees

Identify and document relevant exemptions:

- For each business unit and position
- Apply the 30(b)(6) deposition test: what will your designated corporate representative witness testify as to the relevant exemptions and why those exemptions apply?
- Attorney-client privilege issues

Review and conform documentation

- Salary basis test, plus commissions
- Position descriptions (use of 29 C.F.R. § 541.203(b) duties v. “sales”)
- Recruiting materials
- Training materials

Review pay practices

- Salary basis test
- Minimum wage exposure for low pay periods

Email

- Written policy on company property/no privacy
- Content “hygiene”
- Retention policies

Managing employee complaints

- Retaliation risks
- Established procedure for employee complaint reporting and resolution

Changes in business model

- E.g., less “outside” work and more “inside” work
- Review compensation and duties statements

“Knock Knock . . . Who’s There?”

- 911 procedure when plaintiff advertising / solicitation is identified
- Effective communication of the company’s side of the story

Thank You!

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