Oklahoma Banks: Your Loan Officer May Not Be Exempt Under the FLSA

by Diana Tate Vermeire

Mortgage loan officer compensation has traditionally been a commission-based system that provides the right person the opportunity to make a six-figure salary. Yet, it can also mean that an individual is left with little or no income or stability when she is unable to successfully close a minimum number of loans a month. Perhaps the uncertainty these commission-based compensation systems create coupled with the economy explains the renewed focus on how banks classify loan officers under the Fair Labor Standards Act ("FLSA") and its minimum wage and overtime requirements.

Across the nation and in Oklahoma there has been an increase in collective action litigation against banks for minimum wage and overtime violations under the FLSA. Over the past 20 years, the Department of Labor has adopted regulations and issued opinion letters that have provided inconsistent or directly contradictory standards for the treatment of mortgage loan officers. The changing landscape makes it hard for financial institutions and banks to respond to and to ensure compliance with the FLSA.

For instance, many banks have treated mortgage loan officers as exempt based on either the outside sales or highly compensated exemptions without fully understanding or adhering to the requirements of the exemptions. In particular, the outside sales exemption only applies when an individual spends significant work time outside of a fixed location. Moreover, the highly compensated exemption requires an exempt individual to receive a regular base salary, instead of only being compensated based on commission. Without strict adherence to the current requirements and application of these exemptions, banks have found themselves vulnerable to these suits that create exposure for significant money damages in the amount of the difference between what was paid and what should have been paid for up to three years, the possibility of the damage amount being doubled, and liability for litigation costs and attorneys fees. The exposure to such potentially high damage awards and liability has led many defendant banks to settling these suits.

Banks in Oklahoma and nationwide would be wise to carefully review the status and compensation structure for its mortgage loan officer positions to ensure compliance with the FLSA and/or any relevant exemption. Undertaking such a proactive review with the assistance of counsel is likely to prove cost-effective in the long run. Particularly given the rise in successful collective action lawsuits that take advantage of the confusion caused by the ever changing regulation of this industry.