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Ninth Circuit Decision That Mortgage Underwriters are Nonexempt Under the FLSA Has Greater Ramifications

One of the continuing issues under the federal Fair Labor Standards Act (FLSA) has been whether mortgage underwriters are exempt or nonexempt. A 2009 decision by the Second Circuit held that they were nonexempt. A 2016 decision by the Sixth Circuit held that they are exempt under the administrative exemption because they perform work that services the bank's business.

On July 5, 2017, the Ninth Circuit jumped into the split between the circuit courts and joined the Second Circuit in finding that these employees are nonexempt.

Under the facts before the Ninth Circuit, once a loan officer or broker worked with a borrower to select a particular loan product, the borrower's financial and loan information was run through an automated underwriting system that returned a preliminary decision. From there, the file went to a mortgage underwriter who verified the information in the automated system and the guidelines that the system had applied. The mortgage underwriters were responsible for thoroughly analyzing complex customer loan applications and determining borrower creditworthiness in order to ultimately decide whether the bank would accept the requested loan. They could impose conditions on a loan application and refuse to approve the loan until the borrower satisfied those conditions. The decision as to whether to impose conditions was ordinarily controlled by the applicable guidelines, but the underwriters could include additional conditions. They could also suggest a "counteroffer"—which would be communicated through the loan officer—in cases where a borrower did not qualify for the loan product selected, but might qualify for a different loan. Underwriters could also request that the bank make exceptions in certain cases by approving a loan that did not satisfy the guidelines. Other employees finalized the funding of any loan that the mortgage underwriter approved. Still other employees sold funded loans in the secondary market.

According to the Ninth Circuit, the bank did not prove that the mortgage underwriters performed as their primary duty "office or non-manual work related to the management or general business operations of the employer or the employer's customers," and therefore failed to establish the administrative exemption.

Following the Second Circuit's analysis, the Ninth Circuit found that the mortgage underwriters did not decide if the bank should take on risk, but instead assessed whether, given the guidelines provided to them from above, the particular loan at issue fell within the range of risk the bank had determined it was willing to take. Assessing the loan's riskiness according to relevant guidelines was quite distinct from assessing or determining the bank's business interests. Mortgage underwriters were told what was in the bank's best interest, and then asked to ensure that the product being sold fit within the criteria set by others.

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Accordingly, the Ninth Circuit concluded that where, as here, a bank sells mortgage loans and resells the funded loans on the secondary market as a primary font of business, mortgage underwriters who implement guidelines designed by corporate management, and who must ask permission when deviating from protocol, are most accurately considered employees responsible for production, not administrators who manage, guide, and administer the business.

This split among the circuits makes the determination of exempt status of these and similar employees difficult for employers in the financial industry, and also casts a shadow on this issue for non-financial employers. Unless and until the split is resolved by the Supreme Court, federal legislation, or a clear and persuasive opinion from the Department of Labor, employers should be careful to ensure that the administrative exemption is properly applied and can be defended. It is easily predicted that armed with this decision, mortgage underwriters in states that are covered by the Second and Ninth Circuits will continue to challenge exempt status, and that the Ninth Circuit's decision will further encourage employees to challenge that status in other jurisdictions and contexts as well.

Employers should also be aware that the Ninth Circuit's decision will bolster an employee's case for misclassification under state laws that more narrowly limit the administrative exemption, such as California. The downside of an incorrect exempt/nonexempt classification in such states may result in additional obligations, violations, and penalties. For example, in addition to recordkeeping and pay at the appropriate minimum wage or overtime rate for all hours worked, a nonexempt employee in California must receive an itemized and accurate wage statement of hours worked and be provided with meal and rest breaks of specified lengths and at specified times. The failure to comply with these additional obligations results in additional penalties that can quickly become quite significant and may even be in excess of any wages owed.

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