

# Employment & Labor Issue Alert

## Bank Misclassified Appraisers as Exempt from Overtime Pay, Court Says



October 2, 2015

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This summer a federal court ruled that a class of current and former residential real estate appraisers were improperly classified as exempt from overtime pay under the Federal Labor Standards Act (“FLSA”). In doing so, the court rejected the bank’s argument that the appraisers fell under the administrative, professional, and highly compensated employee exemptions.

The case involved two classes—one comprised of residential appraisers, and another made up of review appraisers. Both groups of appraisers alleged that the bank misclassified them as exempt from overtime under state and federal

law. Last fall the parties settled the claims of the review appraisers for approximately \$5.8 million, leaving only the residential appraisers pursuing their claims.

*Administrative Exemption.* Under the FLSA, an employee qualifies for the administrative exemption if the following three requirements are met: (1) the employee is compensated on a salary or fee basis meeting a certain threshold; (2) the employee’s primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and (3) the employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

The parties disputed whether the appraisers’ work directly related to the bank or its clients’ general business operations. The court agreed with the appraisers’ argument that their work essentially involved production work, with no impact on the bank’s policy decisions. The court rejected the bank’s argument that appraisers engaged in advisory and consulting services, conducted business research, and represented the company to customers and the public. Analyzing facts and making conclusions, the court held, is not in itself sufficient to make an employee exempt.

The court also evaluated whether the appraisers exercised “discretion and independent judgment with regards to matters of significance.” Again, the court found in favor of the appraisers. Although appraisers exercise discretion and independent judgment in conducting appraisals, the court found this discretion was limited in nature and heavily reviewed. Thus, according to the court, they did not exercise sufficient discretion with regard to matters of significance to be exempt.

*Professional Exemption.* To qualify under the learned professional exemption, an employee must meet three elements: (1) the employee must perform work requiring advanced knowledge; (2) the advanced knowledge must be in a field of science or learning; and (3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

In rejecting the bank’s argument that appraisers fall under this exemption, the court explained that generalized education combined with job training typically will not satisfy the requirements of the professional exemption. Although the appraisers were required to complete at least 75 hours of specialized instruction, 150 hours of core curriculum, pass an AQB-approved examination, and attain 2,000 hours of experience as a supervised trainee, this did not satisfy the “specialized intellectual instruction” requirement.

*Highly Compensated Exemption.* An employee with total annual compensation of at least \$100,000 is deemed exempt if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee. Because the appraisers had only one duty—appraising real property—and that duty did not qualify as an exempt duty or responsibility of an executive, administrative, or professional employee, the highly compensated exemption did not apply.

### **Significance**

Worker misclassification is a hot-button issue. And the issue is likely to receive even more attention in light the Department of Labor’s proposed regulations, which would significantly increase the salary requirements of exempt employees (from the current \$23,660 to over \$50,000 per year).

Determining whether white collar workers are really exempt from overtime can be a tricky task. As exemplified by the court’s decision in this case, many jobs that appear or are assumed to be exempt, upon closer scrutiny, may not meet the strict duties test of the FLSA. Although DOL regulations provide guidance, these rules are sometime difficult to understand and often do not apply to an employer’s specific situation. Moreover, in court the burden is on employers to prove that employees do in fact meet the exemption.

Damages for misclassifying employees can be significant. Employers can be found liable to all affected employees for unpaid back wages (payment for all time worked in excess of 40 hours a week at the overtime rate of one and one-half times the regular rate of pay) for up to three years, liquidated damages in an amount equal to the amount of unpaid back wages, and attorneys’ fees. It’s thus not surprising that these cases are so attractive to plaintiffs’ lawyers. Employers should proceed cautiously and seek input from legal counsel when reviewing, changing, or creating job positions and determining whether an employee may be classified as exempt from overtime.

### **For More Information**

If you have questions or want more information regarding FLSA overtime pay exemption issues, you should contact your labor law counsel. If you do not have regular labor law counsel, Foulston Siefkin LLP would welcome the opportunity to work with you to specifically meet your business needs. You may contact **Boyd Byers**, Foulston Siefkin’s Employment and Labor Practice Group Leader, at 316.291.9716 or **bbyers@foulston.com**. You may also contact **Sarah Burch** at **sburch@foulston.com** or 316.291.9752. For more information on the firm, please visit our website at **www.foulston.com**.

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