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## Employee Misclassification In Finance, Consulting

*Law360, New York (May 13, 2009)* -- Hardly a week goes by without a news article about a U.S. Department of Labor investigation or a collective action concerning the misclassification of employees under the Fair Labor Standards Act.

Although these FLSA actions cut across a wide swath of industries, traditionally white collar industries, such as the financial services and consulting industries, have experienced much recent activity concerning misclassification issues.

As examples of this activity, in March 2009, Merrill Lynch & Co. agreed to pay 60 employees called "senior specialists" a total of \$517,000 in back pay to settle a DOL overtime investigation involving misclassification of employees.

In February 2009, a federal judge certified a nationwide collective action against Citigroup (*Dana Gilbert v. Citigroup Inc.*), alleging that Citigroup misclassified employees who were called "banking officers" as exempt under the FLSA.

In another collective action, Hewitt Associates Inc., a human resources and consulting firm, in December 2008 agreed to pay \$4.9 million to settle a lawsuit involving the alleged misclassification of employees known as "benefits analysts."

In each of these instances, the plaintiffs alleged that their employer had misclassified them as exempt employees under the FLSA and did not pay them overtime for weeks in which they worked over 40 hours. The employers countered that the employees at issue were properly classified as exempt under one of the FLSA exemptions.

That there are so many FLSA lawsuits and DOL investigations concerning misclassification reflects and strongly suggests that, even after the issuance several years ago of new regulations to update and clarify FLSA exemption definitions, proper classification of employees, particularly within the "administrative" exemption category, remains murky and confusing.

This is particularly true in the financial services and consulting services industries, where employee titles do not elucidate whether the position falls within an exemption and, if so, which one.

Employees in these industries are called "officers," "analysts," "specialists," "consultants," "brokers" and similar titles, indicating that they are generally performing nonmanual, technical or analytical work, often requiring university degrees, and often for relatively high compensation.

However, as the case law and settlements indicate, these positions may not necessarily fall within one of the FLSA exemptions to overtime. While some DOL regulations exist concerning FLSA classification of financial consultants, there is little case law or DOL guidance concerning the myriad other positions that exist in investment banks, hedge funds and other financial institutions and consulting firms.

In these misclassification actions, plaintiffs seeking to obtain overtime damages as nonexempt employees typically argue that their positions are ministerial and clerical and that they have little or no discretion in decision-making concerning their function.

They may also argue that they have not been properly paid on a salary basis so that even if their duties are considered exempt under the FLSA, their employer's method of paying them or the amounts they are paid renders them nonexempt.

Employers typically respond with a description of the position that is vastly different, in which the employee possesses and exercises discretionary authority and independent judgment in decision-making concerning the function.

Because the employers' and employees' descriptions of the same position are so diametrically opposed, it is extremely difficult to obtain summary judgment in these cases.

## **The FLSA Exemption Analysis**

The issue in the misclassification cases typically centers upon whether the position falls within the "administrative" exemption of the FLSA. Under the FLSA, for an employee to fall under the "administrative" exemption:

- 1) the employee's primary duties must be the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers;
- 2) the employee's primary duties must involve the exercise of discretion and independent judgment concerning matters of significance; and
- 3) the employee must be paid on a salary or fee basis at not less than \$455 per week.

The first two elements require an analysis of what the employee does in the employer's business and the third element involves an analysis of how the employee is paid.

The first element involves an analysis of where the employee's work fits into the employer's business operations (the Work Test).

Work in the finance department of a company generally fits within the Work Test of the administrative exemption. However, in the financial services industry, where financial products are the business of the company, work in finance may not be directly related to the employer's general management of the operations, as opposed to "production."

Thus, the DOL's financial services industry regulations provide that a position will fit within the Work Test of the "administrative" exemption, if the employee's primary function concerns collecting and analyzing information regarding a customer's income, assets, investments or debts; advising customers concerning financial products; determining which financial products meet the customer's needs; or marketing, servicing or promoting the employer's financial products. However, to which positions in a financial services company this definition actually applies is not always so clear.

For instance, in one case, a securities broker claimed that he was nonexempt because his position involved sales since he cold-called potential clients, closed sales and processed the paperwork for transactions.

The court held that the securities broker's work was exempt because only a small amount of his time was spent in these activities and the majority was spent in activities considered "administrative" under the financial services industry regulations, such as information gathering concerning customers and decision-making concerning sales and investments. (*Hein v. The PNC Financial Services Group Inc.*, 511 F. Supp. 2d 563 (E.D. Pa. 2007))

However, in a Barclays Capital case involving "government clearance analysts" whose work involved cross-checking trading records, monitoring the settlement of trades originated by others, investigating and resolving discrepancies in trading records, and initiating bank pair off and round robin processes, the court found an issue of fact as to whether these responsibilities fell within the administrative Work Test category of "advising ... management; planning, negotiating and/or representing Barclays, or promoting the sales and business research and control of Barclays" or whether they were nonexempt trouble-shooting and rectifying trade imbalances functions. (*DiFilippo v. Barclays Capital Inc.*, 552 F. Supp. 2d 417, 423 (S.D.N.Y. 2008).

Thus, whether a position is considered "administrative" involves a close analysis of the primary duties of the position.

The second element requires an analysis of whether the employee possesses any discretionary authority with respect to his or her function (the Discretion Test).

Plaintiffs have often argued that they have no discretionary authority because they must conform to strict, specific guidelines in making their decisions. Notwithstanding policies and guidelines, if an employee is making decisions concerning "matters of significance" to the employer, that function will meet the Discretion Test.

For instance, underwriters for Chase were found to be exempt because they analyzed and rendered individualized decisions which committed their employer to certain financial obligations and could make decisions as to whether make exceptions to or vary from their employer's policies and guidelines. *Whalen v. J.P. Morgan Chase & Co.*, 569 F. Supp. 327, 331 (W.D.N.Y. 2008).

In the same Barclays case described above, the court also found an issue of fact concerning the Discretion Test because the government clearance analyst duties encompassed a combination of functions that were both exempt and nonexempt.

The job involved clearing and settling transactions involving U.S. government and agency securities, determining the need to borrow securities from a third party, deciding whether to accept money differentials and resolving any internal balancing inconsistencies.

According to the plaintiffs, the job involved no discretion at all — they simply ran reports, processed coupons, prepared wire transmissions and any decisions made were narrowly confined and did not involve independent judgment. Barclays, on the other hand, claimed that the position required independent judgment and decision-making concerning trading and the need to borrow securities.

Here, again, for the Discretion Test, an analysis is required to determine whether the primary duties of the position require discretion and independent judgment or merely implementation.

The third element requires an analysis of the amount and method of payment of compensation (the Salary Test).

To meet this test, the employee must be guaranteed either a specific minimum weekly or annual salary. Under the regular Salary Test, an employee must meet a certain minimum weekly compensation as defined in the regulations.

A court held that financial consultants who earned well over the (then) required minimum of \$250 per week did not meet the FLSA Salary Test because the compensation they received was purely commission-based and their monthly draw, even though above \$250 per week, was a loan against commissions and thus not guaranteed compensation. *Takacs v. A.G. Edwards and Sons Inc.*, 04-cv-1852 (S.D. Cal. 2006).

In an August 2004 regulation, the DOL created a streamlined "highly compensated employee" exemption.

To be an exempt "highly compensated employee," in addition to meeting a more streamlined version of the Work Test and the Discretion Test, the employee must earn over \$100,000 per year. At least \$100,000 of the compensation must be guaranteed and not based on discretionary bonuses or commissions.

Thus, an individual who receives a salary of \$105,000 per year and a \$5,000 bonus would meet the test, but an individual who received an annual salary of \$75,000 with a \$100,000 discretionary bonus would not.

## **Practice Tips**

To minimize liability, employers in the financial services and consulting industries should, with the guidance of counsel, conduct an internal review of job positions to ensure proper FLSA classification.

This review should include, at a minimum:

- 1) a review of written job descriptions to determine whether they accurately reflect the daily functions of the position;
- 2) an analysis of each position as to whether the primary duties of the position are truly administrative and involve independent judgment and discretion; and
- 3) a review of salary and compensation practices to ensure that the FLSA exemption is not lost for an otherwise exempt position due to a lack of guaranteed minimum income or improper deductions from payments to employees.

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