

Employment and Immigration Issues Facing Banks

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EMPLOYMENT ISSUES 1. No compensation for compensable work

Many banks—including large, sophisticated banks—are facing class action lawsuits for not compensating non-exempt employees for compensable work. These lawsuits are hard to defend and typically settle up front. The settlements are substantial.

- Types of employees at risk
 - Non-exempt retail branch employees (e.g., tellers, personal bankers, small business specialists, customer service managers).
 - Non-exempt call center employees (e.g., customer service reps).
- Pressure to limit labor costs causes problems
 - Bank managers have high sales quotas but are increasingly pressured to limit overtime, which causes understaffing. As a result:
 - Banks erase or modify employee hours recorded.
 - Banks provide “comp time” instead of paying overtime (comp time is not allowed for non-exempts).
 - Banks undercalculate overtime by ignoring bonuses in calculating the regular rate of pay.
 - Banks instruct employees not to record more than 40 hours in a workweek, regardless how many they work.
 - Banks fail to keep accurate records of employee hours worked.
- Banks fail to allow and/or pay for meal and rest breaks
 - Typically, the problem arises when a bank has a policy that each non-exempt employee must take daily rest and lunch breaks, and automatically deducts for these breaks without confirming that the employee actually took them. Although failing to take breaks may violate policy, generally employees are still entitled to pay for all hours worked.

- Preliminary and postliminary work

- Branch employees sometimes are not compensated for duties performed prior to the start of their shifts (e.g. opening the store and conducting pre-shift security procedures).
- Call center representatives sometimes are not paid for work performed before they clock in (e.g., logging into the computer system; retrieving the headset from the employee's locker).
- Call center representatives sometimes clock out before attending company-sponsored "lunch & learn" sessions; or clock out immediately after the last call of the day and before time spent logging off the computer, cleaning their station, and returning equipment to the employee's locker.

2. Misclassifying non-exempt employees as exempt

Banks face many class and collective actions that allege they misclassified non-exempt employees as exempt and failed to pay overtime due. The issue

This usually involves the administrative or outside sales exemptions. These exemptions typically do not apply unless the employee is performing functions that are directly related to management policies or is working in a sales position outside of the bank branch. Some of the problem positions

- Financial Consultants

- Employed in branches and call centers.
- Primary duty is to cross-sell financial products to the bank's customers and to provide related customer service and clerical duties.
- Misclassification problems arise when these consultants:
 - Do not act as an advisor and counselor to clients, but instead simply sell financial products in response to customer requests.
 - Do not regularly exercise discretion and independent judgment.
 - Primarily work inside the bank branch.

- Home Lending Specialists/Mortgage Loan Officers
 - Primary duty is to complete mortgage applications for the bank's customers.
 - Misclassification problems arise when these specialists:
 - Lack authority to approve/disapprove applications and merely gather information and documents for an application to be processed.
 - Have no management responsibility.
 - Do not have records of their hours kept.
 - Do not primarily sell loan packages outside of the office (outside sales does not include sales made by mail, telephone, or the Internet).
- Commercial Real Estate Appraisers
 - Primary duty is to follow detailed checklists and retrieve or verify data for each appraisal produced or reviewed.
 - Misclassification problems arise when these appraisers lack significant discretion over appraisal values they assign.
- Assistant Branch Managers
 - Can be used as "floaters," performing many of the same duties as non-exempt hourly tellers and customer service reps. Routinely work on the teller line or sales floor.
 - Misclassification problems arise when these assistant managers:
 - Have no meaningful degree of discretion when performing their duties.
 - Have no meaningful authority to create or implement management policies.
 - Cannot commit the bank in matters having significant financial impact.
 - Have little authority in setting employees' wages.
 - Have no meaningful input into hiring, firing, or promoting employees.

- Loan Underwriters

- Primary duty is to evaluate whether to issue loans to individual applicants.
- Misclassification problems arise when these underwriters:
 - Sell loan products under detailed written directions issued by bank.
 - Do not meaningfully advise customers as to what loan products best meet their needs.
 - Have little involvement in setting management policies or policies of general business operations, and instead focus on loan “production.”

3. Across-the-board gender issues

The consumer finance industry is historically seen as male-dominated. For that reason, the EEOC and courts scrutinize claims relating to gender bias in pay and promotion, and look for a sexualized environment. **4. Whistleblower claims**

Because it is so highly regulated, the banking industry is fertile ground for whistleblower claims. **5.**

Criminal background checks

It is appropriate to check criminal histories of job applicants in the banking industry. Indeed, industry-specific laws prohibit the employment of individuals with certain criminal convictions. This does not mean criminal background checks are always permissible. The background check should be seeking only criminal histories that relate to the job in question. This is very fact-specific; one size does not fit all. **IMMIGRANT ISSUES 6. I-9 and E-Verify compliance**

- I-9 record-keeping and audits

- The banking industry, like all others, must comply with the I-9, employment eligibility verification process. Not all employers are aware of the intricacies of completing and maintaining the Form I-9 nor are they prepared for audits. All employers must complete a Form I-9 for all new employees within 3 days of commencing employment. They must meet record-keeping obligations and may be subject to audits by either the U.S. Citizenship and Immigration Services (USCIS) or the U.S. Department of Labor (DOL) Wage and Hour.

- E-Verify

- E-Verify is a voluntary (except in a handful of southern states and Colorado and Utah, where it is mandatory) Internet-based system that confirms eligibility by comparing information from an employee’s Form I-9 to data from the U.S. Department of Homeland Security and the Social Security Administration. Today, more than 500,000 employers nationwide use it at more than 1.4 million hiring sites, and 1,400 new participating companies are enrolling in it weekly. Question: Is E-Verify right for the banking industry and, if so, how can you participate in a safe and compliant manner?

7. Recruiting and hiring foreign nationals

The banking industry may attract a diverse applicant pool, including foreign nationals who are legally in the United States and who have a proper work visa or a status that allows them to be employed in

the United States. The difficulty arises at the time of recruitment. There are rules regarding the questions that can be posed during interviews of these foreign nationals and the steps taken when recruiting and after hiring them. **8. Immigration processes: transparency and consistency**

Because the banking industry is so highly regulated, it is best to have immigration programs that are compliant and ready for the increasingly common random and complaint-driven immigration audits of I-9 files, H-1B visa files, L-1 visa files, and the PERM (green card files). Developing and maintaining a centralized immigration program and implementing an immigration policy managed by a core human resources group dedicated to the hiring and processing of work visas is critical to avoiding criminal and civil liability. Training in I-9 and E-Verify usage is key to any such immigration program or policy. **9. Credit and banking services for foreign nationals**

Foreign nationals create a potential new client base. To attract them, the banking industry must offer services and products impacted by the President's recent Executive Order. The issues are whether to offer services to undocumented individuals and, if so, to consider what is the competition offering. Implementing credit services and other banking products to foreign nationals carries risks.

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