

Key Employment And Immigration Issues Facing Banks Today

February 27, 2015

Law360, New York (February 27, 2015, 10:55 AM ET) -- Today, banks of all sizes hire and manage employees in an increasingly litigious, regulated and global climate where mistakes can be costly. Banks must proactively handle a complex web of issues, including employee compensation, classification and verification; whistleblower and Equal Employment Opportunity claims; and criminal background checks. The following overview, tailored to the banking industry, addresses key labor and employment and immigration issues that commonly arise.

Employment Issues

1. No Compensation for Compensable Work

Many banks — including large, sophisticated banks — are facing class action lawsuits for not compensating nonexempt employees for compensable work. These lawsuits are costly and hard to defend, and typically settle upfront. The settlements are substantial.

Types of Employees at Risk

- Nonexempt retail branch employees (e.g., tellers, personal bankers, small business specialists, customer service managers)
- Nonexempt call center employees (e.g., customer service representatives)

Pressure to Limit Labor Costs can Cause Problems

Bank managers can feel torn in two directions: they have high sales quotas but at the same time are increasingly pressured to limit overtime, which causes understaffing relative to the volume of

business expected from them. That could result in the following:

- Although banks have policies that employees must record all hours worked, pressured supervisors may instruct employees not to record more than 40 hours in a workweek, regardless of how many they work. If supervisors do that, the bank itself is on the hook.
- Supervisors may erase or modify employee hours recorded. Again, banks are on the hook.
- Banks otherwise fail to keep accurate records of employee hours worked. Perhaps, in this age of computers, time is still kept on written forms (to which supervisors have access).
- Banks may provide “comp time” instead of paying overtime (comp time is not allowed for nonexempts).
- Banks undercalculate overtime due by undercalculating the regular rate of pay. (For example, a bank may ignore bonuses in calculating the regular rate of pay. Bonuses that are entirely discretionary do not need to be included in the calculation, but all other bonuses do.)

Banks Fail to Allow and/or Pay for Meal and Rest Breaks

Depending on the length of a shift, the law may require break time for employees. Typically, the problem arises when a bank has a policy that each nonexempt employee must take rest breaks and a lunch break each day, but then 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. If payment for break time may sound minimal, it's not: pay for an hour or two a day times hundreds or even thousands of employees, for three years, doubled, results in a big number.

Preliminary and Postliminary Work

In December 2014, the U.S. Supreme Court took a pro-employer stance on whether employees must be paid for time spent before or after their scheduled shifts. The court held that the company's warehouse employees were not entitled to pay for the time (about a half hour) each day right after their shifts when they underwent security screening (metal detectors) to determine theft, as these screenings were not part of the principal duties the employees were employed to perform. Although this was a pro-employer decision, it is yet undetermined whether it will have a real impact in the banking industry. The issue in the banking industry would be whether the following scenarios would involve the “principal” duties of the employees:

- Branch employees 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 and 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 Nonexempt Employees as Exempt

Banks face many class and collective actions alleging they misclassified nonexempt employees as exempt and failed to pay overtime due.

The Issue

Often, this involves the administrative or outside sales exemptions. These exemptions typically do not apply unless the bank employee is performing discretionary functions that are directly related to management policies or is working in a sales position outside of the bank branch. In the problem positions below, note two themes: does the employee have discretion, and does she work inside or outside of the bank?

Pointer: Many, if not most banks, have job descriptions that emphasize the exempt nature of the various duties these employees should be performing. While that's a plus, it's not enough. If the employee performs substantial nonexempt functions, the employee may be entitled to overtime, even if those nonexempt functions are outside the job description and contrary to a supervisor's orders. As the law has developed on entitlement to overtime, what an employee actually does has become as important if not more so than what they are supposed to be doing.

Some of the problem positions include:

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;

- Problems arise on misclassification when these consultants:
 - Do not act as an adviser 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. (Under overtime law, outside sales is generally treated differently from inside sales.)

Home Lending Specialists/Mortgage Loan Officers

- Primary duty is to complete mortgage applications for the bank's customers;
- Problems arise on misclassification 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;
- Problems arise on misclassification when these appraisers lack significant discretion over appraisal values they assign.

Assistant Branch Managers

- Although these employees have management functions, they also can be used as "floaters," performing many of the same duties as nonexempt hourly tellers and customer service representatives;

- Problems arise on misclassification when these assistant managers:
 - Spend substantial time as a floater;
 - Have no meaningful degree of discretion when performing their management 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 to hiring, firing or promoting employees.

Loan Underwriters

- Primary duty is to evaluate whether to issue loans to individual applicants;
- Problems arise on misclassification when these underwriters:
 - Sell loan products under detailed written directions issued by the 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 historically is seen as male-dominated. For that reason, the U.S. Equal Employment Opportunity Commission and courts scrutinize claims relating to gender bias in pay and promotion, and look for a sexualized environment. If the EEOC targets you, it can be expensive and can become abusive.

4. Whistleblower Claims

Being so highly regulated, the banking industry is fertile ground for whistleblower claims. We see whistleblower and other retaliation claims as problematic. Not understanding the complexities of business, juries may think that a bank would brand anyone who makes any kind of complaint as a troublemaker and terminate them.

5. Criminal Background Checks

The banking industry is an appropriate context for checking criminal histories of job applicants. 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 looking for — and only for — criminal histories that relate to the job in question. This is very fact-specific; one size does not fit all. Note that this area can be a hotspot for the EEOC. Over the last several years, the EEOC has targeted employers who run broad criminal background checks before hiring.

Immigration Issues

6. I-9 and E-Verify Compliance

I-9 Record-Keeping and Audits

In today's regulatory environment and with a heightened sense of the importance of hiring employees with work authorization, the banking industry, like all industries, must comply with the I-9 employment eligibility verification process. The law is clear and requires that all employers must complete a Form I-9 for all new employees hired after Nov. 6, 1986. Further, the immigration rules mandate that employers must complete the Form I-9 within three days of commencing employment.

Employers have record-keeping obligations they must meet to be compliant. Additionally, in recent years, the United States Citizenship and Immigration Services or the U.S. Department of Labor Wage and Hour Division have conducted regular audits of employers' I-9 files to ensure the correct completion and maintenance of these deceptively simple forms. However, not all employers are aware of the intricacies of completing and maintaining the two-page Form I-9 nor are they prepared for the audits. Monetary civil fines reaching into the high thousands have been assessed of varied industries and should be cause for those in the banking industry to review their Form I-9 policy, if one exists, or to implement an employment eligibility verification policy.

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 are using it at more than 1.4 million hiring sites, and 1,400 new participating companies are enrolling in the program 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 U.S. on student visas and may require the employer to process a work visa for them. There are also candidates who have a proper work visa for another employer and as most work visas in the U.S. are employer-specific, the interested employer may need to process a work visa for their organization. Further, certain candidates may be in a status that allows them to be employed in the U.S., but may require the interested employer to monitor the status or renew the status to keep the candidate in legal status with work authorization.

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. Running afoul of such rules may cause big legal problems for the banking industry.

8. Immigration Processes: Transparency and Consistency

Because the banking industry is so highly regulated, and because it attracts a large pool of foreign nationals in varied immigration status or with work visas that may need to be changed or extended, it is best to have immigration programs that are compliant and ready for the increasingly more common random and complaint-driven immigration audits. Increasing audits of I-9 files, H-1B visa files, L-1 visa files and the PERM (green card files) require the banking industry to have policies and programs in place that will defer or eliminate civil and criminal penalties. 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 essential 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 issue is whether to offer services to undocumented individuals and, if so, what is the competition offering. There are risks to implementing credit services and other banking products to such a population. *Originally published by Law360 (subscription required).*

Authored By



James R. Wiley

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