

Fair Labor Standards Act  
Overview  
for  
Boston Private Financial  
Holdings, Inc.

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# The White Collar Exemptions

- Executive Employees
- Administrative Employees
- Professional Employees
- Computer Employees
- Outside Sales Employees

# Minimum Salary Level

- Minimum salary level needed to qualify for the executive, administrative or professional exemptions is \$455/wk (\$23,660 per year).

# The Salary Basis Test

- General Rule:
  - Employee must receive full salary for any week in which the employee performs any work
  - Not reduced because of variations in time worked or quality of work (no pay docking)
  - Reducing vacation time or other paid leave is not a salary reduction

# Permissible Deductions

1. Absence for One or More Full Days
  - Personal Reasons
  - Sickness/Disability if bona fide plan providing some replacement income exists
  - Unpaid Disciplinary Suspension for certain workplace conduct rules
2. Good Faith Penalty for Infractions of Safety Rules of Major Significance
3. Initial and Terminal Weeks of Employment
4. Unpaid FMLA Leave

# Examples of Impermissible Deductions

- Employer Occasioned Absence/Business Operating Requirements
  - Partial week shutdown
  - Business closed for inclement weather
  - Test: Is the employee “ready, willing and able to work”?
- Jury Duty, Witness Court Appearance, Temporary Military Leave
  - permissible to offset for payments received for service

# Safe Harbor

- No Loss of Exemption if:
  - Clearly Communicated Policy Prohibiting the Impermissible Deductions
  - Policy Includes Complaint Mechanism
  - Reimbursement to Employee
  - Good Faith Commitment to Comply
- *Unless Willful Violation*
  - Continuing After Employee Complaints

# Effect of Extra Pay on Salary Basis

- Extra Pay Based on Time Worked
  - Reasonable relationship between salary guarantee and total earnings
- Extra Pay Based on Commissions
  - No reasonable relationship required

# Primary Duty

- Definition: “principal, main, major or most important duty that the employee performs”
- Emphasis on “character of the employee’s job as a whole”
  - Amount of time: “useful guide” but not “sole test”
  - Relative importance of exempt duties
  - Freedom from direct supervision
  - Relative pay levels of nonexempt employees performing the same nonexempt work

# The Executive Employee Exemption

## Elements:

- Primary duty is **management** of at least a department or subdivision;
- Customarily and regularly **directs the work of two or more full-time employees** (or equivalent); and
- Has **authority to hire or fire** other employees or recommendations are given particular weight.

# Administrative Employee Exemption

## Elements:

- 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 ("Production versus staff dichotomy")
- Primary Duty Includes the **Exercise of Discretion and Independent Judgment** with respect to **Matters of Significance**

# Professional Employee Exemption: Learned Professional

## Elements:

- Primary duty must be the performance of work requiring **advanced knowledge**
- In a field of **science or learning**
- Customarily acquired by a prolonged course of **specialized intellectual instruction**

# Creative Professional Exemption

Primary duty must be the performance of work requiring **invention, imagination, originality or talent** in a recognized field of **artistic or creative endeavor.**

# Computer Employee Exemption

## Elements:

- Salaried (\$455/week) or Hourly (\$27.63/hour)
- Systems analysts, programmers or similar jobs with a primary duty of:
  1. **determining** hardware, software or system **functional specifications**;
  2. designing, analyzing or **modifying** computer systems or programs **to satisfy design specifications**;
  3. designing or **modifying programs for operating systems**; or
  4. a combination of those duties.

# Outside Sales Employee Exemption

## Elements:

- Primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities, and
- Customarily and regularly working away from the employer's place(s) of business, including any home office or any other fixed site.

# The Highly Compensated Test

- Total Annual Compensation  $\geq$  \$100,000
  - Includes salary, commissions, non-discretionary bonuses, but not board/lodging, fringe benefits
- Office or Non-Manual Work
- Customarily and Regularly Perform At Least One Exempt Duty
- Make-Up Payment & Pro-Rating Permitted
  - One lump sum payment to reach \$100,000 level within one month
- Employer Right to Select Measuring Period; Calendar Year is Default
- Generally Not Included in State Overtime Pay Laws Unless State Law Adopts the FLSA Exemptions

# Office-Based Mortgage Loan Originators

- Two possible exemptions for mortgage loan originators
  - Administrative
  - Outside Sales (but N/A to office-based employees)
- Professional and executive exemptions are clearly inapplicable

# Office-Based Mortgage Loan Originators (cont.)

## Developments Before Administrator's Interpretation

- *Casas v. Conseco* (D. Minn. 2002) – 2,800 mortgage loan originators were not exempt
- FLSA Regulations (2004) – Financial services employees can be exempt unless they have a primary duty of selling financial products
- DOL Opinion Letter FLSA 2006-31 (2006) – Mortgage loan officers based in employer's offices found to be exempt

# Office-Based Mortgage Loan Originators (cont.)

## Administrator's Interpretation No. 2010-1

- New policy of issuing interpretations
- Rejects 2006 Opinion Letter
- Applies production versus staff dichotomy, treating sales as production work
- Treats compilation and analysis of financial information as incidental to sales work

# Office-Based Mortgage Loan Originators (cont.)

## Alternative Exemption Models

- **Outside Sales** – Key issue is whether employee is customarily and regularly engaged away from the employer's offices, any home office or any other fixed site
- **Highly Compensated Employee** – Key issues are (1) total pay (at least \$100,000 per year, including commissions); (2) customary and regular performance of at least one exempt duty – no clear guidance concerning application to those with a primary duty of sales; and (3) unavailability under many state laws

# Other Exemption Issues

- Financial Services Representatives - Based on Administrator's Interpretation, regulation may be construed narrowly to apply only to those servicing business customers
- Loan Underwriters – Underwriter responsible for selling and determining whether to issue loans in accordance with detailed directions was engaged in “production” work for a financial services employer and was therefore nonexempt. *Davis v. J.P. Morgan Chase* (2d Cir. 2009), *cert. denied* (2010)

# Overtime Pay

## Time Records for Nonexempt Employees

- No particular form required
- Establish workweek for overtime
- Hours worked each workday and total for workweek
- Option for confirming or modifying fixed schedule
- Enforce through disciplinary process, not by withholding pay

## Basic Overtime Rate

- One and one-half times the employee's "regular rate," which is not limited to base pay, for hours over 40 in a workweek
- California: 1 ½ x for over eight hours in a day
  - 2 x for over 12 hours in a day
  - 2 x for over eight hours on seventh consecutive day

# Overtime Pay (cont.)

## **Overtime pay calculation methodology for commissions and bonuses**

- Implement system for recording hours worked
- Apportion commissions/bonuses over workweeks when commissions/bonuses were earned
- For each workweek that includes overtime hours, divide apportioned commissions/bonuses by hours worked to determine hourly rate
- Pay additional one-half time for overtime hours worked

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