Context Matters: Mortgage Underwriters Don't Meet FLSA's Administrative Exemption, Ninth Circuit Concludes

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Mortgage underwriters do not qualify for the Fair Labor Standards Act's administrative exemption because they are more appropriately characterized as "production" employees, according to the U.S. Court of Appeals for the Ninth Circuit. *McKeen-Chaplin v. Provident Savings Bank,* 2017 U.S. App. LEXIS 11950 (9th Cir. July 5, 2017).

In so holding, the Ninth Circuit sided with the Second Circuit, which held in 2009 that the administrative exemption did not apply to underwriters at J.P. Morgan Chase, and rejected the 2016 decision of the Sixth Circuit that reached the opposite conclusion in a case involving Huntington Bancshares. The Ninth Circuit's decision deepens a circuit court split and increases the likelihood the U.S. Supreme Court may hear the case if an appeal is filed.

Applying the Department of Labor's "short duties" test set forth in 29 C.F.R. § 541.700(a), the Ninth Circuit reversed summary judgment in favor of Provident Savings (the "Bank") and directed the district court to enter judgment in favor of the plaintiff and the class of mortgage underwriters she represented. The Court concluded that the mortgage underwriters at issue clearly fell on the "production" side of the "administrative-production dichotomy" because their duties were more related to the creation and sale of the Bank's products (here, home mortgage loans) than to the general operation of the Bank itself.

While the underwriters clearly met the minimum-salary qualification of the exemption, because they did not "perform as [their] primary duty 'office or non-manual work related to the management or general business operations of the employer or the employer's customers,'" the exemption was not satisfied, the Court explained, and there was no need to further determine whether they "exercise[d] [] discretion and independent judgment with respect to matters of significance," the third and final element needed to establish the applicability of the exemption. The Second Circuit had reached the same conclusion in *Davis v. J.P. Morgan Chase & Co.,* 587 F.3d 529 (2d Cir. 2009).

The Ninth Circuit focused in particular on the fact that the mortgage underwriters in question had no authority to decide whether the Bank "*should* take on risk, but instead assessed [only] whether, given the guidelines provided to them from above, the particular loans at issue fall within the range of risk Provident has determined it is willing to take." Both the Ninth Circuit and the Second Circuit also relied heavily on the DOL's opinion letters, finding that there was no meaningful distinction between the mortgage underwriters and mortgage loan officers, the latter of which the DOL specifically had concluded did not qualify for the administrative exemption.

By contrast, the Sixth Circuit held that mortgage underwriters do — or at least *may* — qualify for the FLSA's administrative exemption. In *Lutz v. Huntington Bancshares, Inc.,* 815 F.3d 988 (6th Cir. 2016), the Sixth Circuit held that Huntington's mortgage underwriters met the administrative exemption, concluding that while their duties "touch on Huntington's principal production activity of selling loans, the underwriters exist primarily to service the Bank by advising whether it should accept the credit risk posed by its customers." Distinguishing its holding from that of the Second Circuit, the Sixth Circuit noted that, unlike the underwriters for Chase, Huntington's underwriters had significantly broader discretion to approve loans falling outside of the standard guidelines, to recommend alternative products to customers not qualifying for the loan originally desired, and to "flag" loan applications that appear suspicious or that may be contrary to the customer's best interests.

Significantly, the Ninth Circuit did not hold as a matter of law that mortgage underwriters could *never* qualify for the administrative exemption; rather, the "undisputed facts presented in this case" led to its determination that the Second Circuit's analysis was more applicable than the Sixth Circuit's analysis. For example, an underwriter who had more authority to set policy might meet the exemption under the Ninth

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Moreover, the Ninth Circuit also leaned heavily on the principle that exemptions are to be "construed narrowly" against employers (who bear the burden of proving the applicability of the exemption in question), a principle that has been criticized by several Justices of the Supreme Court, thereby creating another potential basis for appeal to the high court.

Finally, and hardly surprising to employers who have grappled with application of the administrative exemption, the Ninth Circuit noted that the analysis "can be complicated" when applying it to positions that, as was the case in *McKeen-Chaplin,* do not fall squarely into production or sales categories.

Jackson Lewis attorneys are available to answer inquiries regarding this case and other workplace developments.