

Employment Law Compliance, Inc.  
5 Concourse Pkwy NE  
Ste 2575  
Atlanta GA 30328  
Telephone: 866-801-6302 Toll Free  
Facsimile: 770-206-3381

[bankers@employlawcompliance.com](mailto:bankers@employlawcompliance.com)  
[www.employlawcompliance.com](http://www.employlawcompliance.com)

## **RECOVERING BONUS PAYMENTS LEADS TO LOSS OF EXEMPT STATUS**

A pay plan that pays salaried employees a monthly bonus based on year-to-date performance, but also reserves the right to reclaim previous bonus payments if performance falls below a minimum level later, violates the Fair Labor Standards Act's "salary-basis" rule for the overtime exemption. This was the recent finding of a federal appeals court in a case involving the operator of health and fitness centers. *Baden-Winterwood v. Life Time Fitness, Inc.*, 6<sup>th</sup> Cir., No. 07-4437, 5/19/09.

In order to maintain exempt status under the FLSA, most bank positions must meet two tests. First, the primary duty must be the performance of administrative, executive or professional work; second, the position must be paid on a "salary basis." Only very limited deductions from a fixed salary are allowed, such as for benefit plan contributions. Two years ago, the rules on improper salary deductions were changed, and the *Life Time Fitness* case is one of the first to apply the new rules. Under the old rule, the "salary basis" test was met if the employee was not subject to reduction of salary because of variations in the quality or quantity of work performed "under his employment agreement." Under the new rule, the focus is on actual pay received, rather than the employment agreement, and the test is met if there is no actual practice or "significant likelihood" of making such deductions. The court here took an expansive reading of "significant likelihood" and found the "salary basis" test was violated throughout the period the pay plan was in effect. However, the plaintiffs only recovered overtime pay for the pay periods in which actual deductions were made.

Although in a different industry, this ruling has lessons for banks. The recession may lead you to consider ways to recover bonus or commission payments earned and paid in happier times. However, if you have classified the employee as an exempt administrative, executive or professional worker, this practice is regarded as an improper salary deduction, and may lead to the loss of exempt status.

### **Practice pointers:**

- Review compensation arrangements that involve commissions or bonuses to make sure that if there is a "pay back" provision it does not reduce the employee's guaranteed base salary for that pay period.
- Pay performance bonuses or commissions at longer intervals such as quarterly, when a clearer picture of what has been earned emerges.

**For more information on this or other employment compliance issues, please call, or visit our website.**