

### **ANOTHER WAY TO GAIN EXEMPTION FOR MORTGAGE WORKERS?**

In a federal appeals court ruling, a mortgage underwriter's claim that she should be paid overtime was dismissed. (*Havey v. Homebound Mortgage, Inc., Second Circuit, October 22, 2008*). Havey's base level salary was adjusted each quarter based on the projected number of loans she would review. The court found that these prospective salary adjustments were based on the quantity and quality of the work performed, but did not violate the "paid on a salary basis" test for exempt status. Havey had signed an agreement guaranteeing her a minimum \$48,000 per year.

We have alerted you to several cases and US Department of Labor Opinion Letters on whether loan officers and similar positions in the financial services industry are exempt from overtime pay. In 2006 and 2007, several industry giants settled claims that commission-only employees were owed overtime because their salary arrangement violated the "salary basis" test. At that time we recommended switching commission-only employees to a minimum draw, with commissions calculated only on amounts in excess of the draw. Havey's compensation arrangement is similar, and therefore it should come as no surprise that it passes the "salary basis." However, these two-tiered, fluctuating compensation arrangements are complicated to administer, and unless there is a driving reason to have them, we suggest sticking to a simpler salary scheme.

#### **Practice Pointers**

- Regularly review lending positions to make sure they meet *both* the "primary duties" test *and* the "paid on a salary basis" test
- The exemption most often used for lenders is the administrative exemption: the primary duties must include the exercise of discretion and judgment in matters of significance.
- Exempt positions must receive a minimum salary of \$455 per week.
- Avoid salary deductions of less than one whole day's from exempt employees' pay

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