

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
www.employlawcompliance.com

HR COMPLIANCE BURDEN INCREASING FOR BANKS

President Obama took office two years ago with an ambitious agenda of employment law reform. Amongst the bills introduced in Congress were the **Paycheck Fairness Act** to enlarge the **Equal Pay Act** to allow class actions and decrease the burden of proving discriminatory pay decisions, the **Employee Free Choice Act** to allow unionization based on card checks rather than a secret ballot election, and a myriad of proposals with politically attractive names like the **Family Fairness Act** and the **Healthy Families Act** to increase workplace flexibility and leave benefits. *None* of these bills made it into law, shoved off-track first by healthcare reform, then by preoccupation with the economy and continued high unemployment.

So why has the burden of employment law compliance continued to grow, especially for community banks? Two short answers: more aggressive agency enforcement, and the HR implications of a raft of non-employment legislation.

Liability For Decades-Old Pay Decisions

One employment law *did* get passed. In fact, the **Lily Ledbetter Fair Pay Act** was the first bill signed into law by the new President in 2009. This Act overturned a 2007 US Supreme Court finding that Ms. Ledbetter should have made her claim within 180 days of the original discriminatory pay decision, regardless of the fact that she did not find out until years later that she was being paid much less than men doing the same job. Under the new law, each paycheck that reflects a disparity in pay starts the clock again for a claim of pay discrimination, even if the original discriminatory decision was made decades ago.

This presents a significant area of exposure for banks that may not have adequately documented the reasons for pay disparities between individuals sharing the same job title. Trying to develop supporting evidence for pay decisions after time has passed is often difficult, if not impossible. While a manager may believe decisions were based on individual employment performance, or market factors operating at the time, unless that reason can be objectively supported, for example, by comparing loan production figures for employees with different pay rates, the courts are likely to find in favor of women or minorities paid less than white males.

We recommend that banks conduct a fair pay audit to ensure that any pay disparities between employees doing substantially the same job can be objectively justified, and if they can't, that steps be taken to adjust pay. Such audits should be initiated and supervised by legal counsel in order to preserve the confidentiality of results. Pay audits must be carefully planned, and are not to be undertaken without thinking through what corrective measures might be necessary. Essential planning steps are educating senior management about the pay equity issue and managing expectations with regard to outcomes.

New Interpretation of an Old Law

The **Fair Labor Standards Act** was passed as part of the New Deal in the Thirties to ensure a minimum wage and payment of a premium overtime rate for hours worked in excess of forty hours a week. Traditionally, banks have relied on the so-called "white collar exemption" – actually, a group of separate exemptions – to avoid paying overtime to lenders.

In March 2010, the U.S. Department of Labor's Wage & Hour Administrator issued a new Interpretation of the FLSA as applied to mortgage lenders. Under this Interpretation, mortgage lenders do not fit into the "administrative" exemption because their job is basically sales and they serve individual consumers rather than commercial entities. Accordingly, mortgage lenders must record their hours and be paid time-and-a-half for all hours worked in excess of forty a week. The rationale of the Interpretation is equally applicable to many other banking positions which have, like mortgage lenders, been treated as salaried-exempt.

Banks have been scrambling to adjust to this new Interpretation. Is there another overtime exemption that might apply to a particular position? For example, if the lender's primary duty is working outside the bank's premises, calling on customers at their home or place of business, the position might qualify for the "outside sales" exemption. Or if the employee earns more than \$100,000 per year *and* "exercises independent judgment and discretion with regard to matters of significance," he or she might meet the tests for the "highly compensated" exemption. But beware, high loan approval limits do not, on their own, indicate the "exercise of independent judgment and discretion" as intended by the DOL.

Another solution is to manage hours worked, so that individuals in positions which should be reclassified as non-exempt under the new Interpretation never work more than 40 hours a week. This transition is tricky to achieve without raising red flags to disgruntled employees who question why they are now being required to record their time. In addition, new communications technology makes "hours worked" a fluid concept. "Blackberry time" spent checking emails or making cell phone calls must be recorded as compensable working time.

While the ABA has urged the DOL to reconsider its Interpretation, and the courts have confirmed that its application is prospective only, it looks like lenders and others whose primary duty is making loans to individual bank customers must be treated as non-exempt, record their hours worked and be paid overtime. Again, we recommend a wage and hour audit to determine whether bank positions are correctly classified as exempt and which particular exemption applies. If problems are found, they should be promptly addressed, either by adjusting the job to fit an exemption, or reclassifying it as non-exempt.

Social Media and the Workplace

The **National Labor Relations Board** recently ruled that an employee's negative comments about her employer on her Facebook page was "protected concerted action." Union and non-union employers should take notice. This is an evolving legal area, in which there are few reported decisions. With little guidance from the courts, it is critical that banks carefully draft and enforce a social media policy.

The costs to banks of employees using poor judgment in their online postings are very real; bad publicity is just the tip of the iceberg. The risks include disclosure of confidential information and third-party lawsuits based on a range of claims including defamation, invasion of privacy, negligence, discrimination, and violations of state and federal data privacy laws. According to a 2009 Deloitte Ethics and Workplace Survey, fifty three percent of the employees surveyed believe that an employee's social networking page is not their employer's business, and nearly one-third said they never consider what their boss would think before posting material online.

But employee use of social media is a two-edged sword. Content posted by employees is increasingly a source of evidence in employment claims. For example, in a recent case alleging sexual harassment, the plaintiffs' online postings were ruled admissible on the issue of their claim for emotional distress damages. In another case, an employee's LinkedIn postings and Facebook friends were used to show breach of a non-solicitation and non-compete agreement.

One thing is clear: employers cannot afford to ignore the popular and rapidly changing world of social media. New issues will continue to emerge. Banks should carefully monitor their employees' online activities, and re-examine their policies, employment agreements and practices to respond.

Moves to Restrict Use of Credit Checks in Hiring

Many banks use credit checks as a screening tool in hiring or promotions based on the reasonable belief that employees responsible for handling other people's money should be able to show they are competent at handling their own. However, a proposal in Congress and several state legislative initiatives would severely limit the use of credit records as a basis for making an adverse employment decision. Studies show that minority populations have worse credit records than whites, so the use of credit checks may have a disparate impact on minorities. There is also concern that in a recessionary economy with high unemployment, many excellent candidates may have their employment opportunities curtailed because of a credit record that does not accurately reflect their qualifications to handle money.

Although a bill to amend the **Fair Credit Reporting Act** (FCRA) to prohibit use of consumer credit checks against prospective and current employees for the purposes of making adverse employment decisions failed to pass before the end of the last U.S. Congressional session, four states—Hawaii, Illinois, Oregon, and Washington—already have laws limiting the use of credit data for employment purposes. Seventeen other states have bills pending on the issue.

Even if your bank is not doing much hiring at present, take this opportunity to review hiring processes to make sure credit checks are used only where a credit record is truly relevant to the job sought, and only after a contingent offer has been extended, thus reducing the risk of inadvertent discriminatory impact. Credit scores and ratings should be used consistently and thoughtfully, following FCRA requirements to give the candidate an opportunity to correct an inaccurate credit report. Always look at other screening tools such as criminal record checks and past employment references to gain a complete picture of the candidate.

Go Forward ... Carefully

These are just a few of the areas where employment compliance challenges have increased over the last couple of years. There is not space here to go into the EEOC's Final Rule interpreting the **Genetic Information Non-Discrimination Act**, the provision in the **Healthcare Reform** package that offers new federal protections to nursing mothers, or the implications for executive pay of either the **Dodd Frank Act** or the Joint Guidance from bank regulators on incentive compensation arrangements.

In February, the ABA will host a telephone briefing to help HR personnel deal with the new realities and an uncertain future. In the meantime, tread carefully, a deadlocked Congress doesn't mean no new employment compliance burdens. The **Office of Contract Compliance Programs** (OFCCP), the agency charged with enforcing equal employment opportunity and affirmative action for banks with more than 50 employees, recently announced a 20% increase in compliance reviews in 2011.

For more information about this or other employment compliance issues, please contact Employment Law Compliance, Inc.