ALERT

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Ninth Circuit Holds Holds Mortgage Underwriters Are Entitled to Overtime Pay

The Ninth Circuit has held that mortgage underwriters are entitled to overtime compensation under the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. § 201 et seq., for hours worked in excess of forty per week. The Court's decision in *McKeen-Chaplin v. Provident Savings Bank, FSB* (July 5, 2017) Case No. 15-16758, is particularly significant because two prior U.S. Courts of Appeals to consider the same issue reached different conclusions.

Applying the analysis used by the Second Circuit, rather than the Sixth Circuit, the panel held that, because the mortgage underwriters' primary job duty did not relate to their employer bank's management or general business operations, the administrative employee exemption to the Act's overtime requirements did not apply.

Ordinarily, FLSA provisions require employers to pay employees time and a half for overtime work—that is, work in excess of forty hours per week. 29 U.S.C. § 207(a)(1). But employees who are "employed in a bona fide executive, administrative, or professional capacity" are exempt from those provisions. 29 U.S.C. § 213(a)(1). Employers who claim the so-called administrative exemption under FLSA bear the burden of proving its applicability to the employees in question.

To qualify for the administrative exception, an employee must (1) be compensated not less than $455 per week; (2) perform as her primary duty "office or non-manual work related to the management or general business operations of the employer or the employer's customers;" and (3) have as her primary duty "the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a). An employee's primary duty is "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a).

To satisfy the second requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment. 29 C.F.R. § 541.201(a). Courts of appeal commonly refer to this framework for understanding whether employees satisfy the second requirement as the "administrative-production dichotomy."

Mortgage underwriters are typically responsible for thoroughly analyzing complex customer loan applications and determining borrower creditworthiness in order to ultimately decide whether a lender will accept the requested loan. They may impose conditions on a loan application and refuse to approve the loan until the borrower satisfies those conditions. The decision as to whether to impose conditions is ordinarily controlled by the applicable guidelines, but the underwriters can include additional conditions.

In the last decade, two U.S. Courts of Appeals have assessed whether mortgage underwriters qualify for FLSA's administrative exemption and have come to opposite conclusions. The Second Circuit held in *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009), that the job of underwriter falls under the category of production rather than of administrative work. In contrast, the Sixth Circuit in *Lutz v. Huntington Bancshares, Inc.,* 815 F.3d 988, 995 (6th Cir. 2016), held recently that mortgage underwriters are exempt administrators because the perform work that services the bank's business, in addition to the bank's principal production activity.

Given the facts in the *Provident* case, the Ninth Circuit held that the Second Circuit's analysis should apply, since Provident's mortgage underwriters do not decide if Provident should take on risk, but instead assess whether, given the guidelines provided to them from above, the particular loan at issue falls within the range of risk Provident has determined it is willing to take. The Court noted that assessing the loan's riskiness according to relevant guidelines is quite distinct from assessing or determining a bank's business interests.