ALAN S. GARBER

THE GARBER LAW FIRM
1999 HARRISON STREET, SUITE 1350
OAKLAND, CA 94612-3444
TELEPHONE (510) 588-7550
FACSIMILE (510) 588-7555

E-MAIL; asg@*garberlaw.com*

Are Mortgage Loan Officers Employed by a Bank Exempt from Overtime?

This article discusses whether or not mortgage loan officers employed by a Bank would qualify under federal and state law for an exemption from overtime payments. The opinion set forth in this letter is based upon the facts as I understand them to be.

1. Facts

The facts are as follows: The Bank has a couple of mortgage loan officers who used to be paid on a strictly commissioned basis. The Bank recently changed the manner of compensation for these employees and now, instead of paying them on a strictly commission basis, they are paid a salary of $4000.00 per month, plus commissions based upon mortgage loans booked. They receive the base pay irrespective of any commissions earned during any payroll period and the commissions earned are not set off against the $4000.00 salary. Based on a 40 hour work week, The Bank calculates that the mortgage loan officers earn the equivalent of $23.07 per hour. The Bank is also aware that at a minimum, the employees' regular rate of pay must exceed one and one-half (1-1/2) times the minimum wage for every hour worked in weeks where they may work overtime. The Bank also understands that each employee's commission income must be greater than one-half of the employee's total earnings in a representative period. The Bank wishes to know if this compensation agreement and/or the job positions of these mortgage loan officers would make them exempt from overtime.

2. Conclusion

Under these set of facts, it is my opinion that it appears as if these mortgage loan officers would **not** be classified as "exempt" employees by the Wage and Hour Division of the Federal Department of Labor, or by the Californian Labor Commissioner. Thus, they would be eligible to receive overtime payments for all hours worked over eight (8) in one day or forty (40) in one workweek.

3. Analysis

The questioned is whether or not these employees would fall under the "inside, or retail, sales employee" exemption under Section 7(i) of the Fair Labor Standards Act ("FLSA") and/or California Wage Order 4.

Subsection 3(D) of Wage Order 4 exempts certain inside commissioned salespersons from overtime requirements set forth in the Wage Order. (There is a separate exemption for outside salespersons, which is not applicable to this situation.) There are restrictions in both state and federal law as to qualifying for this exemption from overtime. Basically, they are for each workweek in the pay period the earnings of the employee must exceed one and one-half (1-1/2) times the minimum wage for every hour worked, and at least 50% of the employees earnings in each week must be from commissions. This second component of the commissions representing greater than 50% of the employee's total earnings is determined by testing the employee's compensation for a "representative period" of not less that one month.

In applying the provisions of Subsection 3(D) of Wage Order 4-2001, the Department of Labor Standards Enforcement and California courts adhere to the federal government's interpretation of the provisions of 29 U.S.C. § 207(i) (Section 7(i) of the FLSA), the Retail Sales Exemption.

In order to qualify for the Retail Sales Exemption, the employer must be a "retail or service establishment" as that term is defined and interpreted in the law. The federal regulations provide much guidance as to what is or is not a "retail or service establishment:"

29 C.F.R. §779.312 defines a retail or service establishment as "an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

29 C.F.R. §779.313 states that a retail or service establishment "(a) must engage in the making of sales of goods or services; and (b) 75 per cent of its sales goods or services, or of both, must be recognized as retail in the particular industry; and (c) not over 25 percent of its sales of goods or services, or of both, may be sales for resale."

29 C.F.R. §779.314 provides that "retail service" refers to services rendered by establishments which are traditionally regarded as local retail service establishments such as restaurants, hotels barber shops repair shops, etc."

29 C.F.R. §779.318 (a) sets forth characteristics that are "typical" of a retail establishment. These include that it "serves the everyday needs of the community in which it is located," disposes of its products in small quantities, is at the "very end of the stream of distribution," and "does not take part in the manufacturing process."

A review of these regulations may lead one to conclude that a bank qualifies as a "retail or service establishment." However, 29 C.F.R. §779.317 consists of a "Partial list of establishments *lacking* 'retail concept.'" Included in that list are "Banks (both commercial and retail)". Furthermore, in *Casas v. Conseco Fin. Corp.,* 2002 WL 507059 (D. Minn. March 31, 2002) the court held that loan officers working for banks and mortgage companies were not covered by the retail sales exemption despite the fact that they earned most of their pay from commissions because financial companies lack the retail concept."

Previously, banks and mortgage companies would claim that their mortgage loan officers were exempt from overtime based upon the administrative exemption provided for in the FLSA and California Wage Orders. Among other things, they would rely on a September 8, 2006 opinion letter issued by the Wage and Hour Division stating that mortgage loan officers could qualify for the administrative exemption. However, on March 24, 2011 the Deputy Administrator of the Wage and Hour Division withdrew the September 8, 2006 opinion and issued an "Administrator's Interpretation" stating that employees that perform the typical job duties of a mortgage loan officer generally do not meet the prerequisites for the administrative exemption under the FLSA.

Thus, the only possible exemption to overtime that may be available to these loan officers would be if they would qualify for the "outside salesperson" exemption, which is unlikely given their present duties.