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Licensed Financial Advisors Found to be Exempt from Overtime Laws

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Financial institutions are often called upon to wrestle with the classification of employees as "non-exempt" (covered by overtime laws) and "exempt" (not covered by overtime laws). Licensed financial advisors and "registered representatives", whose duties involve both giving financial advice to clients and attempting to sell securities, are often at issue. A February 16, 2016 decision of the U.S. District Court for the Northern District of California in *Tsyn v. Wells Fargo Advisors, LLC*, gives some comfort to financial institutions that these employees, under the right circumstances, may properly be considered exempt.

Under the Fair Labor Standards Act, all employees are entitled to overtime unless they fall into a category of exemption. Financial institutions generally argue that financial advisors fall under the "administrative" exemption. In order to be eligible for that exemption, the employee must earn a weekly salary of at least $455 per week under Federal law ($675 under New York State law), and the employee's *primary* duty "is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers," and "includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a). The Department of Labor regulations discuss financial advisors in §541.203(b):

Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(emphasis added). It is the last sentence that has given financial institutions some difficulty.

The *Tsyn* decision makes clear that a financial advisor, who primarily advises customers on financial matters, even while engaging in sales of securities for the institution, should be considered exempt. Both employees in the case had Series 7 licenses; one of the employees also held Series 63 and 65 securities licenses, while the other had a Series 66 license. As registered representatives, they were subject to FINRA rules. Those rules make it clear that the primary function of the financial advisor is to give investment recommendations and advice based on the needs and desires of the customer. Wells Fargo argued that this made the advisors exempt. The advisors, on the other hand, argued that making sales of securities was an integral part of their jobs.

The California court reviewed a number of authorities, including a key Opinion Letter from the U.S. Department of Labor (which can be read at http://www.dol.gov/whd/opinion/flsa/2006/2006_11_27_43_flsa.pdf) to hold that the "primary duties" of these advisors was to give advice, using discretion and judgment, and that the sales function was merely a function of that professional judgment.

While this decision is clearly comforting to financial institutions, the analysis is highly fact-specific. If a particular institution employs advisors whose duties tilt more heavily to the sales side rather than the advice side, a different result might occur. Financial institutions should review their job descriptions and the actual conditions of employment of their financial advisors to be certain they are properly classified as exempt.

If you have questions regarding employee classifications or any other employment-related issues, please feel free to reach out to Thomas Wassel at 516-357-3868 or twassel@cullenanddykman.com.

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