

Financial Services Sector Employers Take Heed: Wage and Hour Class Action Against BoFA Goes Nationwide

June 25, 2010

By William J. Milani and Kenneth W. DiGia

On June 4, 2010, lawyers for current and former Bank of America branch and call center employees filed a 44-page complaint in a Kansas City, Kansas, federal court seeking to consolidate a dozen wage and hour lawsuits filed in states across the U.S. into a nationwide class action. The suit, which may cover as many as 180,000 employees, could expose the bank to as much as \$100 million in liability.

The Employees' Claims

Among other allegations, the workers claim that the bank violated federal and state wage and hour laws by:

- Forcing non-exempt (*i.e.*, hourly) employees to work overtime without compensating them;
- Failing to provide meal and rest breaks as required by some state laws; and
- Requiring employees to work during breaks without compensation.

The complaint further states that some workers were given compensatory time off in lieu of overtime pay or instructed not to report more than 40 hours of work on their time cards. The employees also allege that, in some instances, the bank modified records that showed that tellers worked overtime.

The workers are seeking compensatory and punitive damages, among other remedies.

Why This Case Matters

Plaintiffs' attorneys believe that the financial services sector is highly vulnerable to allegations of wage and hour violations and, thus, a potentially lucrative source for huge judgments and settlements. In the past year alone, wage and hour class actions have been filed, adjudicated or settled against a number of other financial institutions, including Merrill Lynch, J.P. Morgan Chase and Wells Fargo. The current attempt to expand the pending cases against Bank of America into a nationwide class action is just the latest evidence that the plaintiffs' bar remains intent on aggressively pursuing what it views as a potential goldmine for attorneys' fees.

Wage and Hour Class Actions Can Be Avoided

A wage and hour class action is not inevitable. To be forewarned enables a financial services employer to be forearmed. There are concrete steps an employer can take to ensure that its pay practices are lawful, both on paper and in practice. These measures include:

- **A comprehensive audit of the company's pay policies to ensure compliance with both federal and state laws.** For instance, although not mandated by federal law, some states require that non-exempt employees receive meal and/or rest periods after a certain number of hours worked.

Another area of vulnerability, particularly for the financial sector, concerns the issue of the exempt versus non-exempt employee. The federal Fair Labor Standards Act requires that non-exempt workers be compensated for all hours worked at the rate of one and a half times the employee's regular rate of pay for hours worked over 40 in a workweek. Notwithstanding job titles and written job descriptions, employers should ensure that no employee is misclassified as an exempt worker (e.g., administrative employee). Employers need to carefully review each employee's actual job functions.

Yet another issue arising in recent lawsuits involves the concept of "compensable time." For example, call center workers may be entitled to payment for the time they spend before and/or after their technical shift time performing certain set-up and any other required job-related functions.

- **A thorough investigation of how the company's wage policies are being implemented.** If, for instance, the company has a policy of prohibiting overtime hours without written authorization, the employer should investigate whether this policy is being consistently enforced. Are some employees working overtime without their supervisor's knowledge or with their supervisor's implicit authorization? If so, these employees are entitled to payment for all hours worked, regardless of the company's formal policy.
- **A review of the company's communications practices with respect to its pay policies.** Do both supervisors and employees know the company's policies on overtime work and meal and rest periods? Is there an effective system in place for employees to report possible violations? If the company's policy is to discipline employees who work overtime without the proper authorization, is this policy consistently enforced?

Compliance with wage and hour laws is not easy, especially for financial sector employers, which must decipher and apply complicated exemption tests and other rules. But compliance is achievable, and the alternative – a high-stakes lawsuit or government investigation – can be significantly more burdensome.

For more information about this Advisory, please contact:

William J. Milani

New York
212/351-4659
wmilani@ebglaw.com

Kenneth W. DiGia

New York
212/351-4610
kdigia@ebglaw.com

This Advisory has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice.

About EpsteinBeckerGreen

EpsteinBeckerGreen is uncompromising in its pursuit of legal excellence and client service in its areas of practice: Health Care and Life Sciences, Labor and Employment, Litigation, Real Estate, Business Law, Employee Benefits and Immigration. The Firm is also known for its service to clients in the health, hospitality, financial services and energy industries, among others, representing entities from Fortune 100 companies to startups. Our commitment to these practices and industries reflects the founders' belief in focused proficiency paired with seasoned experience.

Attorney Advertising

© 2010 Epstein Becker & Green, P.C.

www.ebglaw.com

ATLANTA | BOSTON | CHICAGO | HOUSTON | LOS ANGELES | MIAMI
NEW YORK | NEWARK | SAN FRANCISCO | STAMFORD | WASHINGTON, DC

EBC
EPSTEIN BECKER & GREEN, P.C.