

IN PRACTICE

## EMPLOYMENT LAW

# Underwriters Are Not Exempt From Fair Labor Standards Act

BY ANDREW M. MOSKOWITZ

The Second Circuit recently examined the scope of the administrative employee exemption under the Fair Labor Standards Act (FLSA). The court held that employees who did not determine corporate policy or strategy and whose work could be quantified were “production/sales work” employees who did not qualify as administrative employees under the FLSA.

In *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. Nov. 20, 2009), the issue before the Court was whether underwriters who worked at a bank and reviewed loans “in accordance with detailed guidelines provided by their employer” were exempt administrative employees under 29 U.S.C. Section 213(a)(1). Because the Second Circuit determined that these loan underwriters were “production/sales work” employees, not administrative employees, the Court held that they were not exempt from the Fair Labor Standards Act (“FLSA”) and therefore entitled to overtime compensation for time worked in excess of 40 hours per week. How-

*Moskowitz is a partner at Deutsch Atkins in Hackensack.*

ever, because *Davis* examined regulations that the Department of Labor has since revised, the precedential value of the opinion is limited in cases involving the financial services industry.

Although the FLSA exempts executive, administrative, and professional employees from its requirements, the *Davis* Court’s analysis was limited to whether the loan underwriters met the definition of administrative employees under the FLSA. Administrative employees are individuals whose primary duty consists of performing work “directly related to management policies or general business operations” and who regularly exercise discretion and independent judgment. The *Davis* Court noted that “the ‘essence’ of an administrative job is that an administrative employee participates in ‘the running of a business, and not merely . . . the day-to-day carrying out of its affairs.’” In contrast, the work of “production/sales work” employees can be quantified in “hours worked and materials produced.”

The Court devoted much of its opinion to distinguishing between “administrative” employees and “production/sales work” employees. In deter-

mining whether an employee fits into the category of “administrative” or “production/sales,” the *Davis* court held that the “goods” produced by the employer is a significant factor. Thus, while an individual who works in the credit industry and evaluates credit is “more likely to perform a production job,” an employee who “extends credit in order to allow customers to purchase a tangible good that the employer manufactured, for example” is likely to be considered an administrative employee.

The *Davis* court concluded that Chase loan underwriters did not qualify for the administrative employee exemption because they did not determine corporate strategy or policy. In general, underwriters “were given a loan application and followed procedures specified in the Credit Guide in order to produce a yes or no decision. Their work was not related either to setting ‘management policies’ nor to ‘general business operations’ such as human relations or advertising, 29 C.F.R. Section 541.2, but rather concern[ed] the ‘production’ of loans — the fundamental service provided by the bank.”

Moreover, the metrics for evaluating Chase underwriters were “their

productivity in terms of ‘average of total actions per day’ and by assessing whether the underwriters’ decisions met the Chase credit guide standards.” The Court noted that “[p]aying production incentives to underwriters shows that Chase believed that the work of underwriters could be quantified in a way that the work of administrative employees generally cannot.” The underwriters’ work “was primarily functional rather than conceptual. . . . They had no involvement in determining the future strategy or direction of the business, nor did they perform any other function that in any way related to the business’ overall efficiency or mode of operation.” In fact, Chase’s own guidelines “referred to the work performed by underwriters as ‘production work.’”

The *Davis* opinion examined the pre-2004 regulation defining the administrative employee exemption. In 2004, the Department of Labor issued new regulations defining who qualified as an exempt administrative employee under the FLSA. The revised regulations still define administrative employees as those who perform work “directly related to management policies or general business operations” and who regularly exercise discretion and independent judgment. 29 C.F.R. Section 541.200(a)(2)-(3). However, unlike their predecessor, the revised

regulations define these terms. See 29 C.F.R. Section 541.201 (defining “directly related to management or general business operations”); 29 C.F.R. Section 541.202 (defining “discretion and independent judgment”).

Moreover, as the *Davis* court noted, the Department of Labor’s revised regulations also attempt to clarify the classification of jobs within the financial industry. See 29 C.F.R. Section 541.203(b). Although the revised regulation specifically states that employees whose primary duties are selling financial products do not qualify for the administrative exemption, it otherwise appears to greatly limit the importance of the “production” and “administrative” distinction on which the *Davis* court so heavily relied. Specifically, the regulation states that “[e]mployees 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.” 29 C.F.R. Section

541.203(b).

In fact, the Department of Labor issued a September 2006 opinion letter stating that mortgage loan officers were exempt administrative employees under the FLSA. These individuals’ primary duties were collecting and analyzing customers’ financial portfolios; advising customers about certain risks and benefits of various loan alternatives; and working with them to identify and obtain a loan appropriate for their financial circumstances. Therefore, notwithstanding that, as in the case of the Chase underwriters, the work of these mortgage loan officers could be quantified, and they played no role in determining management policies or strategy, the Department of Labor nevertheless determined that they qualified for the administrative exemption.

The importance of the *Davis* opinion will likely be in cases that review the aspect of the administrative exemption that has not changed since the regulations were revised in 2004. The revised regulations specifically address when insurance claims adjusters, financial services industry employees, employee team leaders, executive assistants, human resources managers and others meet the administrative exemption under the FLSA. In cases involving industries who have not received such attention, the *Davis* opinion will be relevant precedent. ■