



CHRISTOPHER L. BRIGHAM, ESQ.
Updike, Kelly & Spellacy, P.C.
One Century Tower, 265 Church Street
New Haven, CT 06510
P 203.786.8310
F 203.772.2037
cbrigham@uks.com

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SECOND CIRCUIT DECISION PERMITS EMPLOYERS TO MAKE PROSPECTIVE ADJUSTMENTS TO EXEMPT EMPLOYEE'S SALARY IF TOTAL COMPENSATION REMAINS AT OR ABOVE PREDETERMINED AMOUNT

Havey v. Homebound Mortgage, Inc., No. 06-0978-cv (2d Cir. 2008).

The Court of Appeals for the Second Circuit recently ruled on a case involving an interpretation of the "salary-basis" test under the Fair Labor Standards Act (FLSA). Under the FLSA, an individual employed in a "bona fide administrative capacity" is exempt from receiving overtime compensation. Two tests must be satisfied in order for an employee to qualify as working in a bona fide administrative capacity: duties test and salary-basis test. At issue in this case was an interpretation of the salary-basis test, which provides that an employee who "regularly receives each pay period . . . a predetermined amount . . . which amount is not subject to reduction because of variations in the quality or quantity of the work performed" will be considered to be paid on a salary basis. The Court held that a compensation system offering a base salary plus potential performance-related bonuses satisfied the pertinent tests under the FLSA and, therefore, the plaintiff was not entitled to overtime compensation.

Linda Havey ("Plaintiff" or "Havey") was formerly employed by Homebound Mortgage ("Defendant" or "Homebound") as a mortgage underwriter. She received a base salary of \$48,000 and was not paid overtime for working more than forty hours per week. Havey was, however, eligible for an additional "tiered compensation," which was earned by agreeing to process more loans in a given quarter. This additional compensation was subject to reduction depending on the quality of work performed. Havey filed suit against Homebound, alleging that she was entitled to overtime compensation under the FLSA because Homebound's compensation system failed to satisfy the salary-basis test, thereby failing to qualify her as an exempt employee working in a bona fide administrative capacity.

The Court declared that, in order to comply with the FLSA, "an employee's compensation must be both fixed and determined prior to the period in which it would apply." In this case Homebound determined salary levels on a quarterly basis. As a result, Havey shouldered the burden of showing that Homebound was in the actual practice of, or had a "clear and particularized policy" of, permitting intra-quarterly salary reductions below the predetermined amount, in order to successfully argue that she qualified as a non-salaried employee. The Court found that any reductions were applied prospectively and only to the

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additional bonus compensation, and that Havey failed to show that her pay could be reduced below her predetermined guaranteed salary of \$48,000. The Court thereby concluded that Homebound's compensation policy allowing quarterly, prospective salary adjustments, while ensuring that the pay never fell below the predetermined \$48,000 rate, did not give Havey an entitlement to overtime pay.

For further information on this case or any other employment related question, please contact Christopher L. Brigham of the Employment Law Practice Group at (203) 786-8310 or cbrigham@uks.com or Angel Peterson of the Employment Law Practice Group at (203) 786-8311 or apeterson@uks.com.

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