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How Mark Thierman's overtime-pay lawsuits could change Wall Street's age-old compensation structure.

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TWO**

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MAN?**



How much can his class-action suits extract from Wall Street?



"big-time labor lawyer." His bookcases are filled with the typical law reference books, family photos and some Star Wars memorabilia, including a life-sized cardboard cutout of Darth Vader that hangs behind his door. His modest appearance is mirrored in his self-deprecating answers to questions, like how he managed to apply a law that no one thought applied to reps: "Maybe I'm just stupid enough to test stuff that everyone else sees as standard. My defense lawyer friends say, 'Mark, this is crazy but you're right.'"

#### It's Not Just About the Overtime

The overtime aspect of these suits are certainly getting the most attention, but what reps involved in the cases are most frustrated with is not the hours they weren't paid for (in most cases, they had no idea they were entitled to overtime). Instead, it's the deductions from gross earnings that they seek relief from. "What brings brokers in are the little things at work that really annoy the heck out of them. The guys don't come because they worked overtime. The brokers hate things like the trading errors they are charged for," Thierman says. Trading errors occur when a broker executes an incorrect order for a client. If money is lost upon correction of the error, it is charged to the broker. The average wirehouse saves up to \$10 million each year by passing trading error costs onto reps, according to Thierman.

That practice, according to Steven Miller, a securities lawyer in Encino, Calif., who is involved in the overtime settlement with UBS, is wrong. Miller, a former lawyer-turned-A.G. Edwards rep who has since returned to law, says he experienced firsthand the deductions from pay as the result of trading errors. "It didn't sit well with me that when I made a trading error I had to take the financial responsibility. When you're an employer you have to take some responsibility," he says. Miller says his frustration with the pay deductions spurred his decision to go back into law and go after firms with similar practices.

Another all-too-familiar deduction firms make applies to the salaries of sales assistants. A lead plaintiff in a pending overtime case in New York, who says he was surprised that overtime pay even applied to him, says his primary reason for joining the suit was the sales assistant deduction he had taken out of his earnings each month. The assistant, whom he shared with other reps, was assigned to him by the firm and his salary was being paid for out of the brokers' earnings. Each rep decided how much to give the assistant, which resulted in a bidding war among reps and poor service for those paying less. He says the assistant provided him with "horrendous" service and that he spent "30 percent of my time double-checking his work because there were so many mistakes." On one occasion, the sales assistant insulted and yelled at him in front of others in the office. "After you set the amount you'll give the sales assistant, you don't really have the power to lower it," he says.

Whether the sales assistant is good or bad, Thierman says, funding his/her salary is yet one more illegal deduction. "You can't charge an employee for another employee's pay. This is not a commune," Thierman argues. He concedes that in some states, not including labor-friendly California where these cases have originated, such deductions are lawful with certain limitations.

The sales assistant deduction appears to be a small price to pay for some current reps though. "It's a mystery in this business that sales assistants can't stick around unless we, as advisors, subsidize their pay," says one wirehouse broker. "But it's one of those 'roll your eyes, whatever' deductions."

Thierman is coupling those "whatever" deductions with his black-and-white argument for overtime and not letting Wall Street turn a blind eye to them again. He says firms will have to change their compensation methods, and, perhaps, pay reps based on their assets under management, or somehow meet the guaranteed salary minimum needed to exempt brokers from overtime.

Brokerage houses are saying very little about the future of compensation, but are standing firm by their current method. A statement from Morgan Stanley after it settled for \$42.5 million said: "We believe financial advisors are exempt professionals under the law and should not be paid on an hourly basis or be forced to keep track of their work time." A spokesperson for Smith Barney, which faces at least two suits, said in a statement, "We believe this suit to be without merit. Smith Barney is committed to fairness in its employment practices and to compliance with all laws, including those related to compensation."

Although labor laws outside of California might tend to be slightly less friendly, Thierman is fairly confident he will be successful as long as brokers are not guaranteed a salary (nor a draw, payment Merrill Lynch gives its brokers, which can be taken back if the broker does not meet certain numbers) that meets the FLSA minimum of \$455 per week. "If we ever get past the salary issue, it will be a tough case to win for both sides, because then you have to go in and define what the role of stockbroker really is — does he advise or does he sell?" That debate, which is all too common to this industry, will be one to watch.

#### The Cost Template

How much will your firm owe you in back pay? Thierman estimates each rep is personally owed \$30,600 in overtime, or a firm with 10,000 brokers would owe a cumulative \$306 million. Here is his calculation method — for both Federal and the state of California — where he has settled with two firms based on this method.

#### Federal Calculation Method

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Annual compensation/total hours work \$153K/2400 = \$63.75 per hour  
(Federal law requires overtime rate to equal half the hourly rate) \$63.75/2 = \$31.877 an hour per hour overtime

Rate of overtime × annual overtime hours × statute of limitations (2, 3 if willful) \$31.877 × 10 × 48 × 2 = \$ 30,600 per broker for overtime back pay

Assuming the major wire house employs 10,000 brokers:  
\$30,600 × 10,000 = \$306,000,000 in damages

**The White-Collar Exemption**

#### California Calculation Method

Annual compensation/2080 (or 40 hours per week × 52 weeks) \$153K/2080 = \$73.56 per hour  
California law requires overtime rate to equal "time × one-half," or \$73.56 × 1.5 = \$110.34 an hour per hour of overtime

Rate of overtime × annual overtime hours × statute of limitations (4, in California) \$110.34 × 10 × 48 × 4 = \$211,852.80 per broker for overtime back pay

Assuming the firm employs 1,600 brokers in California:  
\$211,852.80 × 1,600 = \$338,964,480 in damages


Both the duties and salary test must be passed in order for an individual to be exempt from FLSA overtime laws — plaintiffs lawyers argue that reps are not exempt since they do not receive a salary. Reps who are primarily fee-based are probably exempt, says Thierman.

	Duties Test	Salary Test	Occupations
<b>Executive</b>	The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and must have the authority to hire or fire other employees.	Must be compensated on a salary basis* not less than \$455 per week	Police sergeants, CEOs, editors, company presidents
<b>Administrative**</b>	The employee's primary duty must be 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 employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.	Must be compensated on a salary basis not less than \$455 per week	Superintendents, school principals, human resource, payroll and finance employees
<b>Professional</b>	The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment. The advanced knowledge must be in a field of science or learning must be customarily acquired by a prolonged course of specialized intellectual instruction.	Must be compensated on a salary basis not less than \$455 per week	Doctors, lawyers, teachers, accountants, actors, writers, engineers, architects

\*Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work.


\*\* Stockbrokers have customarily been placed under the administrative exemption by their firms.

Source: Department of Labor

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