

Letter to the Editor - CAL LAW

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I am one of the attorneys on most of the recent overtime cases involving stockbrokers, and I seriously disagree with Allen G. King's recent article, "[Are Brokers Gaming the System?](#)" [Practice Center, Feb. 15].

These cases never alleged a lack of intelligence or sophistication on the part of brokers. However, one can debate their independence as they sold WorldCom and Enron to their trusting clients on "house recommendations," while at the same time writing e-mails to each other about how awful these companies really were.

As every labor lawyer knows, the purpose of overtime is not to reward individuals by paying them more, but to discourage employers who allow employees to work more than 40 hours a week. The function of the overtime laws is to force employers to make their employees take a break from work, to go home at a decent hour, and to enjoy the fruits of their labor. It doesn't matter how much we pay the worker — the incentive to work the worker less comes from the differential between overtime pay and regular pay.

By making it more expensive to work employees more than 40 hours a week, then the smarter employer will hire more people rather than work the same people for longer hours if the work consistently requires more than 40 hours a week to complete it. If it's a temporary situation, then the cost of employee benefits will make it advantageous to just pay the overtime. And that's the law until Congress changes it and the "smart" brokerage houses should obey the law like everyone else.

While I don't feel sorry for the mega-billion dollar brokerage houses either, I agree that the system is too complex. But it's the exceptions that add to the complexity, not the general rule that people shouldn't work 24/7 until they burn out completely. There should be no exemptions from the overtime laws based upon income, and few, if any, exceptions based upon the ability to quantify the time worked (i.e., outside sales, people who "think" subconsciously about their job during their off hours, etc.).

Why should less seasoned attorneys at some firms have to work regularly until 2 a.m., or medical residents and interns work for 48 hours straight just because they have an advanced degree? Studies show that these all-night workers make more mistakes from fatigue, rather than the extra hours adding to the value of their product. Judgment requires clarity and nothing is all that clear after 36 hours of working straight.

Because of the Fair Labor Standards Act and other overtime laws, the United States has one of the best balances between the "cheap labor" from parts of Asia or the Third World, where there are no overtime restrictions, and a nonproductive workforce in socialist countries such as the former Soviet Union or Ireland before they changed to productive capitalism. Now these countries have laws that prohibit terminating employees, and mandating costly benefits discouraged the investment of capital and actually decreased compensation to the workers.

One often forgets that in America, the consumer and the worker are the same person, and it is important that the worker is provided with sufficient leisure time to consume and the consumer with sufficient income to purchase things during that leisure time. The overtime laws produce a decently motivated, productive workforce and healthy, happy consumers. If anything, with the rising costs of benefits, the time-and-a-half overtime penalty is probably not enough to discourage "sweat shops," and there is nothing about an advanced degree or wearing a suit to work that should exempt the worker from these protections.

Ironically, applying the overtime laws to stockbrokers is also accomplishing a valuable service to the consumer. Under the existing law, the only way the stock market industry can avoid the application of overtime laws to

stockbrokers is to structure the duties to fit the administrative exemption.

To qualify as an exempt administrative employee, the employer must make sure the stockbroker's primary duty is not the sale of financial products but the advice the employee provides to customers. This means restructuring the compensation from commission to a salary based upon the assets under the stockbrokers' control. By forcing employers to switch the emphasis of stockbroker compensation away from a "salesman" type of reward system in favor of a true "administrative" adviser system, the stockbrokers are no longer encouraged to "churn" the client with needless trades or to invest in risky portfolios with high commission rates for the broker but little added benefit over lower-cost alternatives to the customer. This is stated in 29 CFR 541.203(b) [emphasis added to last sentence]:

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.*

Since the growth of no load mutual funds and discount brokers, more and more customers are moving away from the traditional broker relationship for this very reason. If the stock brokerage industry wants to exempt its employees from overtime, it had better start listening to its own commercials about being a trusted adviser rather than a shark attacking an unsuspecting client.

The best way to accomplish this goal is to pay its employees for their advice rather for their sales, which may do more than all the SEC investigations and regulations together to produce a consumer-friendly market where those who know the market are truly on the side of the small investor rather than the big scam mutual funds.

For all these reasons, I disagree with King's visceral reaction to overtime compensation for brokers.

Mark R. Thierman
Reno, Nev.