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Merrill Settles Brokers' Suit for Overtime in California

By PATRICK McGEEHAN

Merrill Lynch & Company agreed last week to pay $37 million to settle a claim that it had been shortchanging people for years. But the plaintiffs were not the firm's customers. They were its own stockbrokers.

Merrill has treated its brokers, who earn the bulk of their income from sales commissions, as if they were exempt from state and federal laws on overtime pay. But a suit filed last year on behalf of the firm's brokers in California argued that the brokers should be paid overtime when they work more than 8 hours in a day or 40 in a week.

Rather than take its chances before a federal judge and jury in San Francisco, Merrill agreed to the $37 million settlement, which is scheduled to be reviewed by Judge Maxine M. Chesney on Sept. 9. After the lawyers take their cut of about $9 million, the rest of the money Merrill pays will be split among as many as 3,000 brokers. Some will receive more than $15,000 but most will get less than $10,000, lawyers involved in the case said.

That may amount to less than a month's pay for the typical broker and the total sum is not much money to a firm as big and profitable as Merrill. But labor lawyers said the settlement, the first of its kind, could set off a string of big payouts by financial services firms to their employees around the country for unpaid overtime.

"It's a huge deal with very significant ramifications," said Cliff Palefsky, a lawyer in San Francisco who has sued brokerage firms and other big employers but was not involved in this case. "This is going to set off a chain reaction of wage-and-hour cases against the industry because they have been operating by their own rules for far too long."

A year ago, the federal Fair Labor Standards Act was changed to exempt "white-collar" workers earning more than $100,000 a year from overtime provisions. But that $100,000 has to include at least $455 a week in salary and the employee has to perform at least some administrative duties. It may not apply to stock brokers because of the way they are paid, lawyers said.

Mark Thierman, the lawyer who filed the suit against Merrill, has similar suits pending in California against the other big brokerage firms, including Morgan Stanley, UBS and the Smith Barney unit of Citigroup.

Already, plaintiffs' lawyers are soliciting Merrill brokers in New York to join a similar suit in this state, which is home to more stockbrokers than any other. But lawyers said that it remained to be seen whether such cases would succeed outside of California, whose laws are generally considered to be more favorable to workers. Merrill hinted in the settlement that it considered the situation peculiar to California.

In the proposed settlement its lawyers signed last week, Merrill said that it would "clarify certain compensation policies concerning financial advisers in California."

Mark Herr, a Merrill spokesman, said yesterday that the firm had already made those changes, but he declined to say what they were.

Mr. Herr's only comment on the settlement was: "We believe it was in the best interests of our clients, our financial advisers and the firm to avoid litigation and settle this matter."

Mr. Thierman, who has extracted large settlements on behalf of employees of Starbucks and SBC Pacific Bell, said the argument that pushed Merrill to settle was not about state law but federal labor law.

He argued that federal law exempts from overtime rules the commissioned sales staffs of certain retail business, like clothing stores. But it specifically excludes financial companies from that exemption, he said, even though firms like Merrill refer to their brokerage businesses as "retail."

"The substance of this case is the federal labor law fact that brokers are not by definition engaged in a retail trade," Mr. Thierman said by phone from his office in Reno, Nev.

David Borgen, a partner in Goldstein, Demchak, Baller, Borgen & Dardarian, a law firm in Oakland, Calif., said the case was significant because "it's fair to say it's the first of its nature with regard to stockbrokers."

But he said lawyers had been successfully suing mortgage brokers for classifying their sales employees as exempt from having to be compensated for working long days and weeks. In May, one of Mr. Borgen's partners reached a $30 million settlement with Countrywide Home Loans, a unit of Countrywide Financial, on behalf of 400 sales employees who worked in a call center in Rosemead, Calif.

"They were highly compensated but they were working very long hours," he said of the mortgage sellers.

Like Merrill, Countrywide said it did not believe it had misclassified its workers and would have prevailed at trial. It said it settled to avoid the expense and distraction of prolonged litigation.