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Loan officers may be entitled to overtime pay - by Lisa Casa

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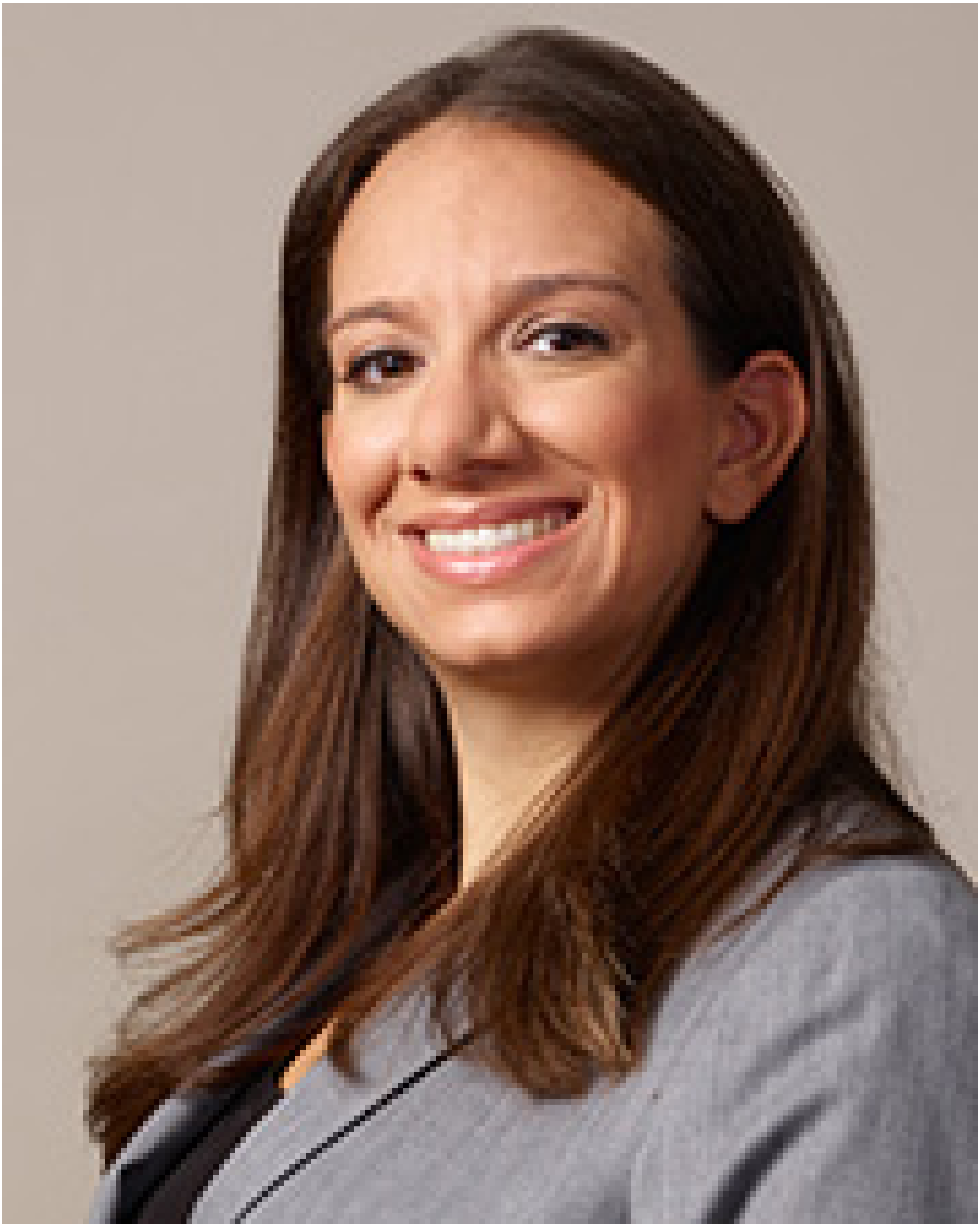

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An issue that has been a subject of recent litigation is whether loan officers are entitled to receive overtime pay. It is often the presumption that since loan officers are frequently paid on commissions and, if successful, are paid well in excess of six-figures, if not seven-figures, they are exempt from overtime. However, the manner in which and amount of pay a loan officer receives is only one consideration when determining whether they are exempt from overtime pay. There are both a federal and state statutory schemes that determine whether a loan officer may be exempt from overtime pay: (a) the federal Fair Labor Standards Act; and (b) the New York Labor Law. While there are slight differences between these two statutes, generally, to be exempt under either statute, a loan officer must satisfy both the salary basis test and perform the duties of an exempt employee.

The first hurdle to being exempt is satisfying the salary basis test because loan officers are often paid either solely or primarily on a commission basis. Employees who are paid only on commissions are not considered to be paid a "salary," and, therefore, cannot be claimed as exempt from receiving overtime under the white-collar exemptions. To claim the exemption, employers may consider paying loan officers a minimum guaranteed salary. Currently, the minimum salary an employee must receive to be exempt is a $1,200/week in New York City, Long Island and Westchester and $1,124/week for the remainder of the state.

The second prong of the exemption test is to demonstrate that the loan officer performs an exempt duty. One such exemption that may be applied is for a bona fide executive. To be considered a bona fide executive, the loan officer must (a) have as their primary duty management; (b) customarily and regularly direct the work of two or more other employees; and (c) have the authority to hire, fire and promote other employees or to have their recommendation for hire, fire and promotion be given particular weight. While not all loan officers will be able to satisfy this criterion, those who are the most senior or who may oversee a branch or other division may satisfy this test.

Employers may try to classify loan officers as outside salesmen. Under the outside sales exemption, employees may be paid based solely on commissions. To be considered exempt from overtime under the outside sales exemption, the loan officer must be (a) customarily and regularly engaged away from the employer's place of business; and (b) primarily engaged in making sales or obtaining orders or contracts for services. In recent years, courts have pushed back against this outside sales exemption for loan officers because they find that loan officers are not customarily and regularly engaged away from employer's place of business. While many employers, particularly post-COVID, have loan officers working remotely, this is not enough to satisfy the prong because if a loan officer still works primarily from one location, be it their home, a coworking space, a rented office or coffeeshop, they are considered to be primarily engaged at the employer's place of business. It is the fact that their work location is fixed, and not constantly changing, which makes loan officers in their current iteration ill-suited to be classified as an outside salesman.

Employers should look closely and consult with legal counsel to discuss classification and pay practices of loan officers to ensure compliance with federal and state law. Failure to pay overtime could result in substantial liability and litigation costs.

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