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DOL Concludes that Loan Officers do not Qualify as Exempt from Overtime Under the Administrative Exemption of the FLSA

"Loan officers" in the residential mortgage banking industry do **not** qualify under the administrative exemption as exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA), according to an "Administrator's Interpretation" issued on Wednesday, March 24, 2010 by the U.S. Department of Labor, Wage and Hour Division (DOL).[1] This results-oriented Interpretation completely reverses and withdraws the prior position that the DOL had taken in an Opinion Letter issued in September 2006.[2]

As we detail below, the current DOL administration did not change the applicable legal test regarding the exemption, but instead it made a general assumption regarding whether a loan officer's primary duty involves "making sales." However, this Interpretation was not based on any particular set of facts (unlike DOL's historical opinion letters), appears to violate requirements for "notice and comment" rulemaking, and gives little or no weight to language addressing financial service employees that was added to the regulations in 2004. Nevertheless, employers who continue to classify their loan officers as exempt under the administrative exemption may face an increased risk of potential overtime claims or possible enforcement actions by the DOL. Additionally, because the FLSA sets the minimum floor on a national level with respect to wage issues, this interpretation (if valid) will apply to all loan officers regardless of the particular state law that may apply to those employees.

The Administrator's Interpretation

The DOL has historically issued "Opinion Letters" in response to fact-specific requests from individual employers or industry groups regarding the DOL's interpretation of a particular regulation or requirement under the FLSA. However, in a sweeping change, the DOL announced on March 24 that it will no longer issue such Opinion Letters but instead will periodically issue "Administrator Interpretations" setting forth a general interpretation of the law, applicable across-the-board to all those affected by the provision in issue, to provide guidance as it relates to an entire industry or category of employees.

Unfortunately for the mortgage loan industry, the DOL's first such Administrator's Interpretation concluded that employees who perform the typical job duties of a mortgage loan officer do not qualify as "administrative employees" who are exempt from the minimum wage and overtime requirements of the FLSA.

[1] DOL Administrator's Interpretation No. 2010-1 (March 24, 2010)
[2] Wage and Hour Opinion Letter FLSA2006-31 (September 8, 2006)

The DOL Interpretation applies to employees who perform the typical job duties of a mortgage loan officer, regardless of their title (with the titles of mortgage loan representative, mortgage loan consultant, and mortgage loan originator given as examples). (The DOL noted that it is the duties and not the job title that determines whether an employee is exempt or not.) The duties analyzed by the DOL included mortgage loan officers who receive internal, external, or other leads to contact potential customers and who then collect required financial information from such customers regarding their income, assets, investments, debt, home ownership, credit history, etc. Typical duties also include identifying and assessing which loan products may be offered to customers based on the financial information provided (based on a computer analysis) and discussing with the customers the terms and conditions of particular loans based on the customers' needs. Mortgage loan officers also compile customer documents for forwarding to an underwriter or loan processor, and may finalize documents for closings.

Based on an analysis of these duties, the DOL concluded that the primary duty of such mortgage loan officers is "making sales" and, therefore, mortgage loan officers perform the "production work" of their employers. Because the typical job duties of mortgage loan officers comprise the selling of loan products of their employer, and their duties involve the day-to-day carrying out of the employer's business, the DOL determined that such loan officers cannot qualify for the administrative exemption under the FLSA. Note that this conclusion is based on general assumptions about loan officers as made by the DOL that will have a possible legal consequence regarding the exempt status of the loan officers.

The Administrative Exemption and the "Production v. Administrative" Dichotomy

Under the FLSA, the employer is required to pay overtime to its employees for all work performed in excess of 40 hours per week, unless the employee qualifies for one of the specified "exemptions" recognized by the FLSA. Available exemptions include the so-called "white collar" exemptions that cover administrative, executive, and professional employees.[3]

With respect to the administrative exemption, to qualify as exempt the employee must not only be paid on a salary basis of at least $455 per week and regularly exercise discretion and independent judgment, but also 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."[4]

In applying this aspect of the duties test, the federal courts and DOL have consistently held that the administrative work must be "directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." [5] Work directly related to management or general business operations of an employer includes work in functional areas such as accounting, budgeting, quality control, purchasing, advertising, research, human resources, labor relations, and similar areas.

The courts and DOL have therefore adopted a "production versus administrative" dichotomy that is intended to distinguish between work that is directly related to producing the goods or services of the business that the company provides (which does not qualify as exempt work), as compared to general administrative work that contributes to "running the business itself" (which qualifies as exempt work).

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[3] 29 C.F.R. § 541.0. Other exemptions include the "outside sales" exemption, the "commission" exemption for employees working in the "retail" industry and, effective in 2004, the "highly compensated employee" exemption. Various "duties" tests and salary/compensation requirements apply with respect to all available exemptions and the requirements "are to be narrowly construed against the employers seeking to assert [the exemption]."

[4] 29 C.F.R. § 541.200

[5] 29 C.F.R. § 541.201(a); *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002)

In 2004, the DOL issued amended regulations to the FLSA that contained a specific example of employees in the financial services industry who could qualify as exempt administrative employees based on the following types of duties:

> 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***. (Emphasis added.)[6]

In issuing the 2006 Opinion Letter, the DOL focused on the first sentence of this regulation, concluding that loan officers were not primarily engaged in selling financial products and, therefore, could qualify for the administrative exemption. However, the new Administrator's Interpretation squarely rejects that conclusion as applying an "inappropriately narrow definition of sales" (and withdraws the 2006 Opinion Letter), seemingly ignores the first sentence of the regulation, and concludes that the primary duty of loan officers is to sell the mortgage products of their employer.[7] As such, the current DOL administration has determined that loan officers are engaged in "production work" and cannot qualify for the administrative exemption. In other words, the DOL did not change the general legal standard that it previously had applied and that the FLSA dictates, but rather it changed how it assesses various duties of loan officers when determining whether the "primary duty" of the loan officers is selling mortgage loans.[8]

What the DOL Interpretation Means for Employers

Although this Administrator's Interpretation does not have the "force of law" in that it is not a regulation or a determination by a court, it may have at least some persuasive effect on the courts and it certainly indicates the position the DOL will take in connection with any future enforcement actions. As such, employers in the mortgage industry may face a significantly greater risk of potential claims if they continue to classify their loan officers as exempt under the administrative exemption.

Because this is the first such "Administrator's Interpretation" issued by the DOL, employers or industry groups may attempt to challenge this "Interpretation" as an impermissible "regulation" adopted without proper notice and comment under the Administrative Procedures Act, but that would likely be a lengthy process and in the interim employers will be subject to potential DOL enforcement actions under this Interpretation. Employers may also choose to directly challenge this Interpretation in court in connection with a DOL enforcement action or, in connection with a civil action not involving the DOL, employers may argue that the Interpretation is invalid and/or should not be followed by the court.

Employers in the mortgage industry who desire to immediately follow this new Administrator's Interpretation may consider taking various approaches, such as:

- Reclassifying loan officers as "non-exempt" and paying them overtime compensation for all work performed in excess of 40 hours per workweek. If an employer pursues this

[6] 29 C.F.R. § 541.203(b)

[7] Other factors that the DOL considered in concluding that loan officers are primarily engaged in "making sales" included the fact that most loan officers are paid on a commission basis and many employers in defending against FLSA lawsuits argue that mortgage loan officers are exempt as "outside sales" employees.

[8] The DOL Interpretation also concluded that work for an employer's "customers" does not qualify for the administrative exemption where the customers are individuals seeking personal advice, such as people seeking mortgages for their homes. If individuals act in a purely personal capacity, the DOL believes they do not have "management or general business operations" covered by the administrative exemption and, therefore, employees who provide that advice would arguably not qualify for the exemption.

objective, proper procedures will need to be implemented with respect to time and record keeping requirements and the proper calculation of overtime compensation (especially with respect to calculating overtime on commissions).

- Reclassifying qualifying employees into another exemption. Alternative possible exemptions such as the "highly compensated employee" exemption (in excess of $100,000 per year) or the "outside sales" exemption (for those loan officers who are primarily engaged in sales activities outside of the office or their home office) should be considered. However, a detailed and fact-specific analysis would need to be made on a case-by-case basis to determine whether any other exemption may exist for the particular employee involved, including an analysis of applicable state law.

Employers should be somewhat comforted to know that under the FLSA's "good faith reliance" defense,[9] claims against an employer based on prior classification of loan officers as exempt may be barred if an employer relied in good faith on the DOL's prior written guidance.

However, this will require an individual assessment based on the particular employer involved as to whether the good faith reliance defense will be available to that employer, and this defense may arguably not be available for periods after March 24, except possibly for the time that would be needed to implement changes. Also, due to other restrictions applicable to this defense, employers should not simply assume that they will qualify for this defense.

Conclusion

In sum, the new Administrator's Interpretation represents a significant reversal of the DOL's prior position regarding the exempt status of mortgage loan officers. Employers in the mortgage industry may not only decide to reevaluate their classifications, but also may choose to use this opportunity to assess an alternative approach for compensating loan officers to control costs appropriately while still complying with the law as currently interpreted by the DOL.

[9] 29 U.S.C. § 259