



Legal Alert: DOL Finds Mortgage Loan Officers are not Exempt Administrative Employees

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The U.S. Department of Labor (DOL) recently issued an Administrator Interpretation stating that employees who perform the usual duties of mortgage loan officers are not exempt from the Fair Labor Standards Act's (FLSA) minimum wage and overtime requirements. The DOL determined that these employees do not meet the requirements of the administrative employee exemption because their primary duty is selling mortgage loan products, which does not relate to the internal management or general business operations of the employer. According to the DOL, mortgage loan officers' duties involve the day-to-day carrying out of a financial service company's marketplace offerings and, "thus, fall squarely on the production [rather than administrative] side of the business."

Administrative Employee Exemption

To qualify for the administrative employee exemption, an employee must be compensated on a salary or fee basis of not less than \$455 per week. Additionally, 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 the employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

Mortgage Loan Officers Duties

In addressing whether mortgage loan officers qualify for the administrative employee exemption, the DOL determined, based upon its investigation and relevant case law, that such employees generally perform the following duties:

- Receive internal leads and contact potential customers or receive contacts from customers generated by direct mail or other marketing activity;
- Collect required financial information from customers they contact or who contact them, including information about income, employment history, assets, investments, home ownership, debts, credit history, prior bankruptcies, judgments, and liens;
- Run credit reports;
- Enter the collected financial information into a computer program that

identifies which loan products may be offered to customers based on the financial information provided;

- Assess the loan products identified and discuss with the customers the terms and conditions of particular loans, trying to match the customers' needs with one of the company's loan products;
- Compile customer documents for forwarding to an underwriter or loan processor; and
- On occasion, finalize documents for closings.

Sales Relate to the Employer's Day-to-Day Operations

Based upon its analysis of the duties generally performed by mortgage loan officers, the DOL determined that such employees are primarily engaged in selling lending products. In support of this determination, the DOL noted that mortgage loan officers frequently are compensated, at least in part, on a commission basis and often are evaluated based upon sales volume.

The DOL then determined that sales of lending products is not work that is directly related to the management or general business operations of the employer, but is instead work related to the "production operations" of the employer – i.e. work related to the goods and services that constitute a financial services company's marketplace offerings.

Mortgage Loan Officers' Duties do not Relate to the Management or Business Operations of the Employers' Customers

The DOL also stated that employees do not qualify for the administrative exemption by performing work related to the management or general business operations of the employer's customers if these customers are individuals seeking advice for their personal needs, such as a home mortgage loan. "Individuals acting in a purely personal capacity do not have 'management or general business operations' within the meaning of this exemption."

The Interpretation acknowledged that advice to a business customer about a financial decision relating to the business (such as a mortgage to buy land to build a new manufacturing plant) might qualify under the administrative exemption. Nevertheless, based upon its analysis of a typical mortgage loan officer's primary duties, its determination that such employees are primarily engaged in making sales for the employer, and because homeowners do not have management or general business operations, the DOL determined that a typical mortgage loan officer's primary duty is not directly related to the management or general business operations of the employer's customers.

Withdrawal of Prior Opinion Letters Inconsistent with this Interpretation

Finally, the DOL stated that an example provided in its 2004 final rule (29 C.F.R. § 541.203(b)) does not create an alternative standard for employees in the financial services industry, but is instead intended to provide an example to help distinguish between those employees in the financial services industry whose primary duty is related to the management or general operations of the employer's customers and those whose primary duty is selling the employer's financial products. Accordingly, the DOL withdrew two earlier opinion letters

that appeared to interpret this provision as an alternative standard for employees in the financial services industry.

New DOL Procedure for Providing Guidance on Laws and Regulations

The March 24, 2010, Administrator Interpretation is the first issued under the DOL's new policy of providing a general interpretation of the law and regulations, which is applicable across-the-board to those affected by the provision addressed. This new practice replaces the DOL's former policy of issuing opinion letters in response to specific factual scenarios. The DOL has stated that it will now issue Administrator Interpretations when the Administrator determines that further clarity regarding the interpretation of a statutory or regulatory issue is appropriate. More information regarding the new practice is available on the DOL's web site at:

http://www.dol.gov/whd/Hightlights/archived.htm#March24_2010

Employers' Bottom Line

In light of the significant amount of litigation regarding whether employees performing the duties of mortgage loan officers are exempt or nonexempt, it is not surprising that the DOL's first interpretation under its new practice addresses this issue. Additionally, the DOL's interpretation could impact other positions in the financial services industry and beyond where the customers are individuals, not business clients. While courts interpreting the FLSA are not bound by the DOL's interpretations, they may give significant deference to the agency's position.

An employee's status as exempt or nonexempt is based upon the actual job duties the employee performs, not job title. Accordingly, employers in the financial services industry may want to reexamine the classification of employees performing the duties identified by the DOL as those generally performed by mortgage loan officers. Any such evaluation should be done at the direction and under the supervision of experienced employment law counsel to help ensure the confidentiality of the analysis.

If you have any questions regarding the Administrator's Interpretation or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.