

CLIENT ALERT

U.S. Department of Labor Opines on Whether Mortgage Originators Qualify as Exempt from Minimum Wage and Overtime Under the Fair Labor Standards Act

On March 31, 2006, the United States Department of Labor (“DOL”) weighed in on a controversial issue concerning how financial institutions pay their employees. The Wage and Hour Division of the DOL issued an opinion letter addressing whether mortgage originators¹ qualify for the minimum wage and overtime exemption for outside sales employees set forth in Section 13(a)(1) of the Fair Labor Standards Act. The DOL concluded that, in some circumstances, mortgage originators may qualify as exempt outside sales employees. The opinion letter, although not binding, provides significant guidance for employers with sales employees in the financial services industry and beyond.

The Fair Labor Standards Act

Subject to exceptions, in general, the Fair Labor Standards Act (“FLSA”) requires employers to pay employees a minimum wage for all hours worked, and overtime pay for hours exceeding 40 in a given week.² Historically, the exceptions to the minimum wage and overtime provisions are historically narrowly construed against employers. Section 13(a)(1) of the FLSA provides one such exemption from minimum wage and overtime requirements for any “employee employed... in the capacity of outside salesman.”³ To qualify as an “outside salesman” the following criteria must be met:

- (1) The employee’s primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- (2) The employee must be customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.

29 C.F.R. § 541.500. The burden is on the employer to prove both prongs of the test. “Primary duty” means “the principal, main, major, or most important duty that the employee performs.” 29 C.F.R. § 541.700. The phrase “customarily and regularly”

¹ Mortgage originators may also be known as loan officers or mortgage officers.

² Employers must also be mindful of relevant state laws, which may also require the payment of minimum wage and/or overtime.

³ Other exemptions may be applicable to mortgage originators as well, including the administrative exemption. At present, the DOL has not yet opined on whether the administrative exemption could apply to mortgage originators.

means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks. 29 C.F.R. § 541.500.

The DOL regulations also define what it means to be “engaged away from the employer’s place of business.” Outside sales encompasses an employee who makes sales at the customer’s place of business or the customer’s home. Outside sales does not include sales made by mail, telephone, or the Internet unless such contact is used merely as an adjunct to personal calls. 29 C.F.R. § 541.502. However, the regulations also explain that the “employer’s place of business” includes the employee’s home office because “any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer’s places of business even though the employer is not in any formal sense the owner or tenant of the property.” 29 C.F.R. § 541.502. Finally, the regulations recognize that outside sales employees may perform promotional work if it is incidental to and in conjunction with an employee’s own outside sales or solicitations.

DOL Opinion Letter

With its regulatory definitions as guidance, the DOL issued an opinion letter concluding that employees of finance companies who obtain and solicit mortgages may be exempt outside sales employees.⁴ First, the DOL concluded that where mortgage originators’ primary duty is selling loan packages, they are conducting “sales” within the meaning of the FLSA. Thus they meet the first prong of the test for outside salesmen.

The DOL then turned to the more difficult question found in the second prong of the test for outside salesmen – whether mortgage originators are “customarily and regularly engaged away from the employer’s place of business” in performing their sales. The DOL focused on the extent to which the mortgage originator engages in sales or solicitations outside of the employer’s facilities. For instance, when a mortgage originator meets a client at the client’s home, the mortgage originator is acting “outside” of their employer’s place of business. If the mortgage originator only solicited in a client’s home, then there is little doubt that the mortgage originator was regularly engaged away from the employer’s place of business. The DOL noted the practical reality that mortgage originators may perform some activities at their employer’s place of business, so long as the inside activity is incidental to and in conjunction with qualified outside sales activity. Activities such as making phone calls, sending emails, and meeting with clients in the office are exempt if performed incidental to or in conjunction with the mortgage originator’s own outside sales activities.

Employers Must Be Careful in Assessing Whether Their Sales Force is Exempt

⁴ The opinion letter, number FLSA2006-11, is available through the DOL’s web site at: <http://www.dol.gov/esa/whd/opinion/flsa.htm>.

Despite the DOL's opinion letter, employers must take a careful look when analyzing whether their sales employees qualify as exempt under the outside sales exemption. First, the opinion letter is not binding in any court. Second, some courts have analyzed whether mortgage originators qualify as "outside sales" have disagreed with the DOL's conclusion. Specifically, as recently as March 6, 2006, a federal district court judge in Missouri concluded that loan originators who make sales calls from their employer's offices were not exempt as outside sales employees. In that case, *Belton v. Premium Mortgage, Inc.*, Judge Howard Sachs analyzed the job duties of loan originators and determined that because the loan originators in question spent most of their time in the office during regular business hours, even if making sales calls, they were entitled to sue their employer for overtime pay under the FLSA.

Due to the conflicting authorities on the application of the exemptions to overtime and minimum wage, employers should consult with counsel when analyzing whether employees are "exempt" or "non-exempt." Employers should consider whether their sales staff is, in fact, "customarily and regularly" engaged away from the employer's place of business. Employers should consult with legal counsel to aid in the analysis and to identify means by which to decrease the likelihood of a successful lawsuit by an employee claiming to be owed minimum wage and overtime under the FLSA and/or state law.

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