

CLIENT ALERT: U.S. Department of Labor Concludes Mortgage Loan Officers Are Not Exempt Under the Administrative Exemption to the FLSA

In an interpretation issued on March 24, 2010 (the “[Interpretation](#)”), the United States Department of Labor (“DOL”) concluded that individuals who perform the functions of a mortgage loan officer do not qualify as *bona fide* administrative employees exempt under the Fair Labor Standards Act (“FLSA”). The Interpretation provides guidance in an area of the law frequently litigated, and reverses the position previously held by the DOL.

The Fair Labor Standards Act

Subject to exceptions, in general, the FLSA requires employers to pay employees a minimum wage for all hours worked, and overtime pay for hours exceeding 40 in a given week. Section 13(a)(1) of the FLSA provides one such exemption from minimum wage and overtime requirements for any employee employed in a *bona fide* administrative capacity. To qualify as an “administrative” exemption, the following criteria must be met:

1. The employee must be paid on a salary or fee basis of not less than \$455 per week;
2. 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 employer’s customers; and
3. The employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200. 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” 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.

DOL Administrative Interpretation

In analyzing whether mortgage loan officers qualify for the administrative employee exemption, the DOL noted that based on its investigation and survey of case law, mortgage loan officers (or employees bearing similar titles) 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
- May occasionally finalize documents for closings.

Based upon its analysis of these duties, and the fact that many mortgage loan officers are paid by commission based upon loans closed, the DOL concluded that such employees are primarily engaged

in selling lending products. 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. Rather, the DOL found that selling lending products is the employer's business.

The Interpretation also analyzed whether a mortgage loan officer could qualify for the administrative exemption by virtue of performing work directly related to the management or general business operations of the employer's customers. While the DOL acknowledged that advice to a business customer concerning a financial decision related to the business (i.e. a mortgage to buy land to build a new facility) may qualify, the DOL noted that advice for personal needs of a customer (i.e. mortgage on a home) would not. 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.

Under either analysis, the DOL found that mortgage loan officers are not exempt under the administrative exemption.

This Interpretation reverses the position previously taken by the DOL in prior opinion letters of September 8, 2006 and February 16, 2001. Notably, the DOL withdrew its prior opinion letter in which it found that mortgage originators qualified under the administrative exemption (FLSA 2006-31). The DOL Interpretation did not address its view that under certain circumstances a mortgage loan officer could be exempt under the outside sales exemption (FLSA 2006-11). See April 19, 2006 MBJ Client Alert entitled, *Department of Labor Opines on Whether Mortgage Originators Qualify as Exempt Under the FLSA*.

Impact of the Interpretation

Mortgage companies and banks have been saddled with costly litigation concerning whether mortgage loan officers qualify as exempt from minimum wage and overtime provisions. In this Interpretation, the DOL provides potential plaintiffs with a road map of how to prove their claim. While courts interpreting the FLSA are not bound by the DOL's interpretations, they may give significant deference to the agency's position. Because of this Interpretation, in many circumstances, an employer will have a very difficult time demonstrating that a mortgage loan officer is administratively exempt.

In light of this Interpretation, employers in the financial services industry should reexamine the classification of employees performing the duties identified by the DOL as those generally performed by mortgage loan officers. Employers should also 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.

If you have any questions regarding the Interpretation or other labor or employment related issues, please contact your MBJ attorney.

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