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Are Your Loan Officers Properly Classified Under the FLSA?

Why Banks Need to Carefully Examine the Exempt Status of All Mortgage Loan Originating Employees

By Kary Wolfe





In 2006, the Department of Labor's Wage and Hour Division issued an Opinion Letter concluding that typical mortgage loan officers are exempt from the payment of overtime pursuant to the administrative exemption of Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1).

See Opinion Letter
FLSA 2006-31.

The 2006 Opinion Letter was relied upon by many employers in the mortgage industry to treat mortgage loan officers, mortgage consultants, mortgage originators, mortgage bankers and other similar positions as exempt administrative employees. Last year, the Department withdrew its 2006 Opinion and issued an unsolicited Administrator Interpretation finding that typical mortgage loan officers *do not* fall within the FLSA's administrative exemption. See Administrator's Interpretation No. 2010-1 ("the AI"). Even before the AI, there was significant litigation challenging the exempt classification of mortgage loan officers. Since March 2010, the number of new FLSA collective actions filed by and on behalf of mortgage loan officers has skyrocketed. Although there have been a few positive developments in the past year, there remains considerable risk for employers who rely upon the administrative exemption to justify not paying overtime to mortgage loan officers.

(Continued on page 24)

Are Your Loan Officers Properly Classified Under FSLA?

Continued from page 23

The Administrative Exemption and the Department's 2006 Opinion Letter Pertaining to Exempt Status of Mortgage Loan Officers

The FLSA's Administrative Exemption applies to employees who meet the salary test and the following duties tests:

- (1) 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
- (2) 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(a). The first prong is further defined in the regulations as "work 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." 29 C.F.R. § 541.700(b). Section 541.203 includes specific examples of occupations that would generally meet the administrative duties test, including "[e]mployees in the financial services industry." Such employees are ordinarily considered to 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.

29 C.F.R. § 541.203(b).

In a 2006 Opinion Letter, issued upon request, the Department found as follows with regard to specific mortgage loan officer duties described by the requesting employer:

Your description of the duties of these mortgage loan officers suggests that they have a primary duty other than sales, as their work includes collecting and analyzing a customer's financial information, advising the customer about the risks and benefits of various mortgage loan alternatives in light of their individual financial circumstances, and advising the customer about avenues to obtain a more advantageous loan program. Based upon the foregoing, we conclude that these mortgage loan officers satisfy the duties requirement under 29 C.F.R. § 541.203(b).

The Department went on to find that the described mortgage loan officers satisfied the traditional duties requirements of the



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administrative exemption under § 541.200(a)(2)-(3), stating that “the employees here service their employer’s financial services business by marketing, servicing, and promoting the employer’s financial products.”

The Department reverses course on the applicability of the administrative exemption to “typical” mortgage loan officers.

On March 24, 2010, the Department issued Administrator’s Interpretation No. 2010-1, which is titled “Application of the Administrative Exemption under Section 13(a)(1) of the [FLSA] to Employees who Perform the Typical Job Duties of a Mortgage Loan Officer.” Unlike the 2006 Opinion, the AI was unsolicited and not based on specific factual circumstances. Instead, the AI was based on the Department’s description of “typical” mortgage loan officer duties, including “receive internal leads and contact potential customers,” “collect required financial information from customers,” “run credit reports,” “enter the collected financial information into a computer program that identifies which loan products may be offered to customers,” and “assess the loan products identified and discuss with the customers the terms and conditions of particular loans, trying to match the customer’s needs with one of the company’s loan products.”

The analysis in the AI focuses on the “production versus administrative” dichotomy, which is intended to distinguish “between work related to the goods and services which constitute the business’ marketplace offerings and work which contributes to ‘running the business itself.’” See *id.* (quoting *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002)). The Department found that applying this litmus test to typical mortgage loan officers “leads to the conclusion that they have the primary duty of making sales.” The Department further found that the typical commission-based compensation method, training in sales techniques, and evaluation of performance on the basis of sales volume all support the conclusion that a mortgage loan officer’s primary duty is sales. Finally, the Department noted that no court had found to date that mortgage loan officers, working inside or outside the employer’s place of business, have a primary duty other than sales. In conclusion, the Department states that “loan officers who perform the typical duties described above do not qualify as bona fide administrative employees exempt under section 13(a)(1) of the [FLSA].”

The *Henry v. Quicken* Verdict against mortgage loan officers is not a silver bullet.

Providing a glimmer of hope to employers is the recent jury verdict in an FLSA lawsuit by mortgage loan officers, the first one since the publication of the AI. On March 17, 2011, the jury in *Henry v. Quicken Loans, Inc.*, which was tried in the Eastern District of Michigan, found that Quicken’s mortgage loan officers were not entitled to overtime. The plaintiffs argued that they were misclassified as administrative employees. However, Quicken was able to persuade the jury that its loan officers used broad discretion and independent judgment and that their primary duties

were administrative. Although this verdict provides some hope for mortgage loan companies who are subject to similar lawsuits, employers should keep in mind that this is the decision of one jury based on the evidence presented in that case, including the particular duties of those loan officers. Moreover, the verdict for the employer did not require either the court or the jury to reject the AI because the Department conceded in court filings that the AI would apply only prospectively starting March 24, 2010.

The Mortgage Banker’s Association joins the fray in 2011.

Early this year, the Mortgage Banker’s Association filed suit against the Department of Labor, challenging the AI under the Administrative Procedures Act, 5 U.S.C. § 702.¹ In its suit, the MBA argues that the Department can only reverse a prior interpretation of its regulations after giving notice and an opportunity for public comment. Secondly, the MBA argues that the AI is contrary to the plain language of the FLSA regulations and is therefore arbitrary, capricious, an abuse of agency discretion and illegal. As of this writing, both the Department and the MBA have filed dispositive motions and a ruling on the merits could be issued before year’s end. Whatever the district court decides, employers should expect many more months of litigation before this a final decision is issued.

Collective actions challenging the exempt status of mortgage loan officers have proliferated since the AI.

The MBA makes the following statement in its complaint against the Department: “Interested parties, including many of MBA’s members, now face substantial exposure from private-party litigation alleging that well-compensated mortgage loan officers are misclassified and are entitled to collect both back overtime wages and penalties.” The MBA is actually putting it mildly. If an employer is found liable under the FLSA for failure to pay overtime, the damages include (1) payment of back overtime, (2) liquidated damages in an amount equal to the back overtime, and (3) payment of the employee’s costs and attorney’s fees. And, since the publication of the AI, FLSA lawsuits by mortgage loan officers have skyrocketed. Most of these suits are filed as collective actions, which could include hundreds of plaintiffs. My research found just five new FLSA collective actions filed by mortgage loan officers from 2008 through March 23, 2010. Since March 24, 2010, there have been twenty-one collective actions filed by mortgage loan officers alleging that they were misclassified as exempt administrative employees.

Are there any alternatives for maintaining the exempt status of mortgage loan officers?

Given the substantial risk of liability for unpaid overtime associated with relying on the administrative exemption, what are the options for employers of mortgage loan officers? First, employers should engage in an assessment of their classification of mortgage

(Continued on page 26)

¹ See *Mortgage Bankers Association v. Hilda Solis*, in the United States District Court for the District of Columbia, 1:11-cv-00073-RBW.

Are Your Loan Officers Properly Classified Under FLSA?

Continued from page 25

loan officers, under the guidance of legal counsel, immediately, if they have not already done so.

Second, employers may consider whether their loan officers qualify for another FLSA exemption. The executive exemption requires (1) that the employee's primary duty is "managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;" (2) that the employee "customarily and regularly direct[s] the work of at least two or more other full-time employees;" and (3) the authority to hire and fire, or the employee's suggestions on hiring and firing are given particular weight. Another option is the highly compensated employee exemption which is available for employees who are paid total annual compensation of \$100,000 or more. The highly compensated employee must also have a primary duty which includes office or non-manual work and perform at least one of the exempt duties of the exempt, administrative or professional employee. For example, a highly compensated loan officer who supervised two other employees could take advantage of this exemption. Employers may want to consider reallocating supervisory duties to mortgage loan officers so that they can take advantage of either the executive or highly compensated exemption.

Lastly, employers may consider whether employees qualify for the outside sales exemption, or adjusting their duties so they do. This exemption applies to an employee whose primary duty is making sales and who is "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. Outside sales persons make sales at the customer's place of business or home, make in-person calls to referral sources to develop borrower leads and have considerable flexibility in their schedules.

Although an employer may be able to assert a defense to FLSA liability if it can show that its use of the administrative exemption was done in good faith in conformity with and in reliance on the Department's prior interpretation, this protection would likely not apply after March 24, 2010. See 29 U.S.C. § 259(a). Thus, all employers of mortgage loan officers should take steps now to reduce the risk of liability for failure to pay overtime under the FLSA. ■



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Ms. Kary Wolfe is a trial lawyer with Jones Walker whose focus in the areas of employment law and commercial litigation. Her experience includes the representation of employers in the financial, fabrication and assembly, mining, retail, government, real estate development, and service industries.



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