

Department of Labor Concludes Mortgage Loan Officers Are Not Exempt Administrative Employees, Reversing Previous Opinion

Typical mortgage loan officers are no longer considered “administrative” employees who would be exempt from the overtime requirements of the Fair Labor Standards Act (FLSA), according to the U. S. Department of Labor (DOL). In its first Administrative Interpretation, issued March 25, 2010, the DOL concluded that because they are responsible primarily for the sale of mortgage loans, loan officers are production workers rather than administrative staff. This decision reverses the DOL's position outlined in its Sept. 8, 2006 Opinion Letter.

The Interpretation focused on employees who perform the job duties typical of most mortgage loan officers, regardless of title. This could include mortgage loan representatives, mortgage loan consultants or mortgage loan originators. The employee’s actual job duties and compensation, not job title, determine whether an employee qualifies as exempt.

Administrative vs. Production

The FLSA requires that most employees receive overtime pay for all hours worked in excess of 40 hours in a workweek. However, there are some exceptions to the overtime requirement, including the administrative exemption. To qualify for the administrative exemption, an employee must:

- Primarily perform office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers;
- Include the exercise of discretion and independent judgment with respect to matters of significance; and
- Receive a salary or fee of at least \$455 per week.

The DOL reasoned that because mortgage loan officers' primary duty is making sales, they are performing the production work of their employers. In other words, they are producing a tangible service. Among other activities, employees who sell or broker mortgage loan products collect financial information from customers, enter it into a computer program to determine what loan products are available to the customer, and explain the different options of such products to a customer so that a sale can be made. The DOL ruled that such duties are not related to the management or general business operations of the employer as they do not involve “running or servicing the business itself,” unlike the duties of employees in “functional

areas such as accounting, budgeting, quality control, purchasing, advertising, research, human resources, labor relations and similar areas.”

In determining that the primary duty of a mortgage loan officer was making sales, the DOL also considered the following factors:

- Mortgage loan officers often are compensated on a commission basis;
- They usually are trained in sales techniques; and
- They are evaluated based upon sales volume.

The DOL stated that administrative work performed for an employer’s customer does not qualify for the exemption -- where the customers are individuals seeking advice for their personal needs, such as home mortgages -- as they do not have “management or general business operations” within the scope of the exemption. However, the DOL left open the possibility that an employee who provides advice to a *business* customer regarding a mortgage -- to purchase land for a plant, to buy a building for an office, or to acquire a warehouse to store goods -- might qualify under the administrative exemption, assuming the employee meets the other prongs of the exemption.

Risk Control Implications

Although the Interpretation is not a regulation or a court decision, it indicates a change in the direction of the DOL, and the courts may give it some weight. The Interpretation also reflects a change in the DOL’s procedures. The DOL announced that it will now issue general guidance through such Administrative Interpretations rather than Opinion Letters issued in response to fact-specific requests.

Those employers that have relied upon the September 2006 Opinion, which has now been vacated, should review their compensation policies and practices with respect to employees who perform the typical job duties of a mortgage loan officer. In light of the Interpretation, such a review should focus on an employee’s primary duty and whether or not it is “production work.” Remember, it is not the employee’s title, but rather, the work that the employee performs which governs whether the administrative exemption applies.

Also recognize that other exemptions may come into play. For example, the outside sales exemption may apply if loan officers typically are engaged in business away from the employer's office. Depending on annual income earned, the highly compensated employee exemption also may be valid.

Although this Interpretation was limited to the particular job duties of a “typical” mortgage loan officer, it has potentially broader implications. The DOL’s use of the production/staff test could, for example, foreshadow the use of this analysis with respect to other occupations in the financial services industry.

Now is a good time for employers to perform an audit to determine whether they have classified their employees properly. Misclassification of employees with respect to overtime eligibility is a serious problem which can have severe consequences. Lawsuits regarding misclassification are increasing, as are judgments in such cases. As financial services employees are usually fairly well compensated, a lawsuit can result in a multimillion dollar settlement or verdict.

The cost to defend such cases also can be extraordinarily expensive. In light of the additional funds provided to the DOL under the President’s budget, an increase in enforcement efforts is anticipated. A proactive employer will audit its pay practices and make necessary changes before a plaintiff’s lawyer or the DOL arrives at its doorstep.

July 2010

By CNA Employment Practices Liability Risk Control 40 Wall Street, New York, NY 10005

#

Click <http://www.dol.gov/WHD/opinion/adminIntrprtnFLSA.htm#2010> to read a copy of the March 25, 2010 Administrative Interpretation.



The purpose of this article is to provide information, rather than advice or opinion. It is accurate to the best of the author’s knowledge as of the date of the article. Accordingly, this article should not be viewed as a substitute for the guidance and recommendations of a retained professional. In addition, CNA does not endorse any coverages, systems, processes or protocols addressed herein unless they are produced or created by CNA. Any references to non-CNA Web sites are provided solely for convenience, and CNA disclaims any responsibility with respect to such Web sites. To the extent this article contains any examples, please note that they are for illustrative purposes only and any similarity to actual individuals, entities, places or situations is unintentional and purely coincidental. In addition, any examples are not intended to establish any standards of care, to serve as legal advice appropriate for any particular factual situations, or to provide an acknowledgement that any given factual situation is covered under any CNA insurance policy. Please remember that only the relevant insurance policy can provide the actual terms, coverages, amounts, conditions and exclusions for an insured. All CNA products and services may not be available in all states and may be subject to change without notice. CNA is a registered trademark of CNA Financial Corporation. Copyright © 2010 CNA. All rights reserved.