

PUBLICATION

DOL Wage & Hour Division Changes Course: Mortgage Loan Officers are Typically Not Exempt

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In its first piece of written guidance since President Obama took office, the U.S. Department of Labor's Wage and Hour Division released a new form of guidance document on March 24, which it refers to as an "Administrator's Interpretation." According to the Wage and Hour Division, it will no longer issue familiar "Opinion Letter" guidance documents, addressing specific facts related to specific questions and situations. Instead, the Division has indicated that it will offer an "Administrator's Interpretation" when it deems further clarification is needed on an issue that has general application to a broad group of affected parties. If the first release of this new type of guidance document is any indication of what is to come, employers may have reason for concern.

In its first Administrator's Interpretation (No. 2010-1), the Wage and Hour Division states a position related to the application of the "administrative employee" overtime exemption to mortgage loan officers that is completely contrary to the position it offered on the same issue just three years ago. Under a previous Opinion Letter dated September 8, 2006, the Wage and Hour Division concluded that a mortgage loan officer whose duties involved less than 50% of their time actually interacting with individual customers for purposes of "selling" loan products could qualify as exempt from overtime pay as a bona fide administrative employee under section 13(a)(1) of the Fair Labor Standards Act (FLSA). But in its new Administrator's Interpretation, the Division opines that a mortgage loan officer will not typically qualify under the administrative employee exemption because the purpose and very nature of all the work performed by such employees is ultimately related to selling, which is, in turn, related to "production," as opposed to the "administrative" operations of the employer's business. With this change in policy, the Division specifically withdrew its previous Opinion Letter to the contrary as well as an older Opinion Letter related to the same issue.

In its Administrator's Interpretation the Division states that, while what is commonly referred to as a "mortgage loan officer" may carry several different titles, such as "mortgage loan representative," "mortgage loan consultant," or "mortgage loan originator," such a position, whatever it is called, typically involves the performance of the following duties:

"Mortgage loan officers receive internal leads and contact potential customers or receive contacts from customers generated by direct mail or other marketing activity. Mortgage loan officers 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. They also run credit reports. Mortgage loan officers 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. They then 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. Mortgage loan officers also compile customer documents for forwarding to an underwriter or loan processor, and may finalize documents for closings."

According to the Wage and Hour Division's new Administrator's Interpretation, "mortgage loan officers typically have the primary duty of making sales on behalf of their employer; as such, their primary duty is not directly related to the management or general business operations of their employer or their employer's customers."

The interpretation is entitled to "deference" by federal courts applying the FLSA. Accordingly, employers with financial services employees who have job duties similar to those described above should carefully consider whether those employees should or should not be classified as exempt administrative employees. Moreover, given the Division's hostile view toward the application of the administrative employee exemption, it may be wise for employers to take a hard look at any situation in which they rely upon this exemption.

If you need assistance with this or any labor and employment issue, do not hesitate to contact your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys, located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.

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