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March 26, 2010

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## DOL Ruling Excludes Mortgage Loan Officers From Administrative Exemption To The Fair Labor Standards Act

By: Vincent T. Norwillo, Esq.

Employers in the financial services industry should be aware of a new Department of Labor ("DOL") Wage and Hour Division Administrator's Interpretation ("Ruling") regarding the exempt status of mortgage loan officers. In this March 24<sup>th</sup> Ruling, the Administrator concluded that employees who perform the typical job duties of a mortgage loan officer, and who spend the majority of their time working inside their employer's place of business or the employee's home office, do not meet the administrative exemption to the Fair Labor Standards Act ("FLSA" or the "Act"). Administrator's Interpretation No. 2010-1. The Ruling is a radical departure from DOL precedent that had previously applied the administrative exemption to mortgage brokers. While an official DOL interpretation of the FLSA is not legally binding on courts, this Ruling will be extremely persuasive to courts determining the exempt status of many mortgage loan officers.

Generally, an employee qualifies for the administrative exemption if: (1) the employee is salaried at a rate 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 the 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." See 29 C.F.R. § 541.200.

Based on "significant enforcement experience" and a "thorough review of the case law," the Administrator concluded that mortgage loan officers have the primary duty of "making sales" - and

therefore fail the "duties test" of the administrative exemption. Indeed, the Ruling includes a lengthy recitation of what the Administrator viewed as the "typical job duties" of a mortgage loan officer:

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.

In performing these duties, the Administrator reasoned that mortgage loan officers were "production rather than administrative employees" whose primary duty was to sell the employer's products on a day-to-day basis. According to the Administrator, mortgage loan officers did not compile and analyze potential customers' financial data to provide financial advice to that customer. Rather, they were simply evaluating the customer's qualifications for a loan and screening customers for their employer according to established financial criteria (i.e., "making sales").

The Administrator likewise noted the typical compensation arrangement for mortgage loan officers to support her conclusion that their primary duty was "making sales." Citing considerable case law, the Administrator observed that mortgage loan officers have long been compensated primarily by commissions - sometimes with a base wage, salary, or draw - but invariably based upon completed sales and often tied to the loan amount. Moreover, mortgage loan officers receive particular sales technique training, and their performance is evaluated on the basis of their sales volume. Because sales success directly determines compensation, the Administrator concluded that such a payment structure established "sales" as a mortgage loan officer's primary duty.

The Ruling did not revoke the exempt status of all mortgage loan officers. Indeed, the Administrator specifically restricted application of the Ruling "to employees who spend the majority of their time working inside their employer's place of business, including employees who work in offices located in their homes." The Ruling expressly does not apply to mortgage loan officers who are "customarily and regularly engaged away from their employer's

place of business" or who cold-call potential customers. It is apparent, then, that mortgage loan officers may still qualify for the "outside sales exemption" under Section 13(a)(1) of the Act. Indeed, the Ruling concedes that sales are a loan officer's primary duty - a required element of this exemption.

Moreover, the Ruling distinguishes between those sales employees who have the primary duty of making sales to individual customers (such as mortgage loan officers) and those employees who "spend the majority of their time on a variety of duties such as promoting the employer's financial products generally, deciding on advertising budget and techniques, running an office, hiring staff and setting their pay" and servicing and advising customers. Mortgage loan officers who fit the latter description may still qualify for the administrative exemption, assuming they meet the other elements of the test.

Employers are encouraged to read the full Ruling, which can be found at [www.dol.gov/whd/opinion/adminIntrprtnFLSA.htm](http://www.dol.gov/whd/opinion/adminIntrprtnFLSA.htm). Additionally, pursuant to the Ruling, the DOL is withdrawing Opinion Letter FLSA2006-31 and Opinion Letter dated February 16, 2006, 2001 WL 1558764. Employers should no longer rely on the reasoning in those opinion letters for guidance.

This Ruling is significant for all employers - regardless of whether they employ mortgage loan officers. As the DOL's Wage and Hour Division budget for fiscal year 2011 will increase by \$20 million, part of which will go toward the hiring of additional investigators, it is expected that the DOL will act more aggressively and focus efforts on scrutinizing both exemption and independent contractor classification issues in a number of situations.

Employers can benefit from a preemptive self-audit to determine FLSA compliance. For assistance, please call your local Gonzalez Saggio & Harlan office or other trusted counsel.

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