Loan Originators & Overtime: What Should Employers Do?

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Within the past few years, there have been significant legal developments concerning mortgage loan originators and overtime payments. The most recent development occurred on February 28, 2014, when the Department of Labor ("DOL"), among others, filed a Petition for Writ of Certiorari to the Supreme Court of the United States.[1] This Petition requests review of a 2013 United States District Court of Appeal's decision which reinstated an earlier interpretation by the DOL that permitted mortgage loan originators to qualify for an overtime exemption to the Federal Fair Labor Standards Act. At the time of this writing, the Supreme Court has neither granted nor denied the Petition for Writ of Certiorari.

As background, the Federal Fair Labor Standards Act[2] ("FLSA") covers employers with annual dollar volume of sales or receipts in the amount of $500,000.00 or greater. Therefore, most lending institutions are obligated to comply with the FLSA. The FLSA generally provides that employers are required to pay overtime wages to employees that work greater than forty (40) hours per week. There are, however, several exceptions to this rule, including in circumstances where employees are "employed in a bona fide executive, administrative, or professional capacity. . . ."[3] The exemption that has historically been applied to mortgage loan originators is referred to as the "administrative exemption."

The issue of overtime and mortgage loan originators has been hotly debated over the years. In 2006, the DOL opined that loan officers "ha[d] a primary duty other than sales, as their work include[d] 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 financial circumstances, and advising the customer about avenues to obtain a more advantageous loan program."[4] As such, the DOL concluded that loan officers, if paid on a "salary basis," would qualify for the administrative exemption under the FLSA and not be entitled to overtime payments for working more than forty (40) hours per week.[5]

The DOL, however, reversed its course in 2010 by issuing an "Administrative Interpretation" which expressly withdrew its 2006 Opinion Letter.[6] The 2010 Interpretation concluded that employees who perform mortgage loan officer duties do not qualify for the administrative exemption and, therefore, should be provided overtime compensation when a loan originator works greater than forty (40) hours per week. The 2010 Interpretation found that a loan originator's primary duty is making sales, not administrative work related to the management or general business operations of the employer. Peculiarly, the 2010 Interpretation stated that because individual homeowners do not have management or general business operations, "work for an employer's customers does not qualify for administrative exemption where the customers are individuals seeking advice for their personal needs, such as people seeking mortgages on their homes."[7]

Subsequent to this reversal in course by the DOL, litigation ensued challenging the DOL's 2010 position. In 2013, the Court of Appeals for the D.C. Circuit determined that the DOL violated the Administrative Procedure Act ("APA") by issuing the conflicting interpretation without prior notice and comment periods.[8] Under the APA, a government agency must provide notice and open the matter for comment prior to issuing a ruling that is contradictory to that agency's prior position. The Court of Appeals remanded the matter to the district court with instructions to reinstate the 2006 Opinion Letter.[9] Notably, the Court of Appeals decision did not analyze the core issue of whether mortgage loan originators meet the parameters of the administrative exemption. Further, the DOL has appealed Court of Appeals for the District of Columbia ruling, not to determine the merits of whether a loan originator is exempt from overtime payments, but instead to determine the DOL's rights to issue contradictory interpretations in light of the APA. In any event, the Supreme Court's decision will have a significant bearing on the ultimate issue of overtime payments to loan originators, both in the short and long term.

Presently, the issue of overtime pay for mortgage loan originators is in limbo. What appears clear is that the DOL will likely continue to pursue a position similar to the 2010 Interpretation. If the Supreme Court upholds the Court of Appeal's decision, the DOL could very well issue a proposed interpretation, similar to the 2010 Interpretation, and provide notice and comment for the same, as required by the APA. During the intervening time, employers should carefully monitor this issue and seek advice of counsel if any questions concerning classification arise. UNITY

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[1] Perez v. Mortgage Bankers Ass'n, No. 13-1041 (2014).

[2] 29 U.S.C. § 201, et seq.

[3] 29 U.S.C. § 213(a)(1).

[4] See attached the September 8, 2006 Opinion Letter issued by the Department of Labor at 4-5.

[5] Id. at 6.

[6] See attached the March 24, 2010 Administrative Interpretation issued by the Department of Labor.

[7] Id. at 6.

[8] Mortgage Bankers Ass'n v. Harris, 720 F.3d 966, 970 (D.C. Cir. 2013).

[9] Id. at 972.