

# MORTGAGE LOAN OFFICER CLASSIFICATION & POTENTIAL IMPLICATIONS



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The Supreme Court of the United States (“Supreme Court”) has ruled in favor of the United States Department of Labor (“DOL”) in its reclassification of mortgage loan officers as non-exempt employees who are eligible for overtime payments.<sup>1</sup> The Supreme Court’s analysis centered primarily on whether the Administrative Procedures Act<sup>2</sup> (“APA”) required the DOL to use the APA’s notice-and-comment procedures when the DOL “wishes to issue a new interpretation of a regulation that deviates significantly from one the agency has previously adopted.”<sup>3</sup> The Supreme Court ruled that the “clear text of the APA’s rulemaking provisions” do not require the DOL to go through such a notice-and-comment process when issuing a new interpretation.<sup>4</sup> The purpose of this article is to guide local banks through the ramifications and potential pitfalls of this decision. This article is not intended to encompass a detailed review of the prior proceedings leading to the Perez decision.<sup>5</sup>

The Supreme Court’s ruling effects banks with respect to its application of the Federal Fair Labor Standards Act<sup>6</sup> (“FLSA”), which covers employers with annual dollar volume of sales or receipts in the amount of \$500,000.00 or greater. Consequently, a vast majority of 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 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. . . .”<sup>7</sup> The exemption that has historically been applied to mortgage loan originators is referred to as the “administrative exemption.”

In 2010, the DOL issued an “Administrative Interpretation”<sup>8</sup> which concluded that mortgage loan officers are not exempt from FLSA provisions under the administrative exemption. The 2010 interpretation was in direct conflict with the DOL’s 2006 guidance.<sup>9</sup> Litigation ensued to determine whether the DOL could make such a ruling without notice-and-comment requirements. In Perez, the Supreme Court ruled that the DOL does have this authority and that the 2010 interpretation is controlling for banks moving forward.

The Perez decision has many implications for both local and national banks. First, it makes clear that the typical mortgage loan officer is no longer exempt from the overtime requirements of the FLSA and should be paid overtime compensation. Banks must ascertain which of their

mortgage loan officers they had been classifying as exempt under the administrative exemption and appropriately reclassify those employees. Certain mortgage loan officers are presently classified as exempt under the executive exemption. Those executive exempt employees are unaffected by the Perez ruling.

Second, it would be prudent for banks to re-examine whether mortgage loan officers previously classified as exempt under the administrative exemption may, likewise, qualify for the executive exemption. Employees qualify for the executive exemption if: (1) the employee is compensated on a salary basis at a rate not less than \$455 per week; (2) the employee’s primary duty is managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; (3) the employee customarily and regularly directs the work of at least two or more other full-time employees or their equivalent; and (4) the employee has the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees is given particular weight.

For those mortgage loan officers who simply do not meet

the criteria for executive exempt status, which is likely a majority of these employees, it is imperative that banks make the swift, proactive change in their payment practices of these mortgage loan officers to avoid violation of the FLSA and the Perez holding. Noncompliance with the FLSA can lead to severe penalties levied upon employers, particularly for willful violations.<sup>11</sup>

Third, the Perez ruling does note, however, that the FLSA protects employers who have, up to the date of decision, acted in good faith reliance on the DOL’s 2006 opinion letter<sup>12</sup> in classifying mortgage loan officers as exempt from overtime pay requirements under the FLSA’s administrative exemption.<sup>13</sup> As a result, some employers may escape retroactive liability for failing to pay overtime to mortgage loan officers. These determinations, however, will be made on a case-by-case basis.

Clearly, the Supreme Court’s ruling in Perez will have widespread ramifications for banks in West Virginia. It is critical that banks take a proactive approach in establishing proper classifications for all mortgage loan officers to avoid potentially severe penalties. Banks should certainly seek advice of counsel for questions concerning both past and future classifications. **INVTY**

<sup>1</sup>Perez v. Mortg. Bankers Ass’n, 135 S. Ct. 1199 (2015).

<sup>2</sup>5 U.S.C.S. § 553(b)(A).

<sup>3</sup>Perez, 135 S. Ct. at 1203.

<sup>4</sup>Id. at 1200.

<sup>5</sup>For a greater examination of the proceedings leading to the Supreme Court’s ruling, please see [http://www.dinsmore.com/loan\\_originator/](http://www.dinsmore.com/loan_originator/).

<sup>6</sup>29 U.S.C. § 201, et seq.

<sup>7</sup>29 U.S.C. § 213(a)(1).

<sup>8</sup>See March 24, 2010 Administrative Interpretation Issued by the Department of Labor.

<sup>9</sup>See September 8, 2006 Opinion Letter issued by the Department of Labor at 4-5.

<sup>10</sup>[http://www.dol.gov/whd/overtime/fs17b\\_executive.pdf](http://www.dol.gov/whd/overtime/fs17b_executive.pdf).

<sup>11</sup><http://www.dol.gov/claws/esa/flsa/11-1c/2011.htm>.

<sup>12</sup>See September 8, 2006 Opinion Letter issued by the Department of Labor at 4-5.

<sup>13</sup>Id. at 1209.