

SPECIAL REPORT

Presented by the Credit Union Law Team of Whyte Hirschboeck Dudek S.C.



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Mortgage Loan Officers Once Again Exempt Employees Under the Fair Labor Standards Act

by Tiffany L. Hutchens and Gina Carter

The U.S. Court of Appeals for the District of Columbia Circuit recently reinstated 2006 guidance from the Department of Labor (DOL) advising that mortgage loan officers are exempt from overtime requirements in the Fair Labor Standards Act (FLSA). *Mortgage Bankers Assoc. v. Seth D. Harris, Acting Sec. of U.S. Dept. of Labor.*

Under the FLSA, employers are generally required to pay overtime to employees who work more than 40 hours per week. The FLSA provides several exemptions to this requirement, and they include employees in bona fide executive, administrative or professional positions. Whether mortgage loan officers qualify for the "administrative exemption" has been, in the words of the court, "a difficult and at times contentious question." To qualify for the exemption, an employee:

- must be compensated at a rate not less than \$455 per week;
- have as a primary duty the performance or work directly related to the management or general business operations of the employer or the employer's customers; and
- exercise discretion and independent judgment with respect to matters of significance.

In 2006, the DOL issued an opinion letter advising that mortgage loan officers fell within the administrative exemption to the overtime

requirement. Mortgage loan officers were considered to exercise independent judgment and discretion when assisting clients in achieving financial goals and effectively managing mortgages. Mortgage loan officers were thought to assess multiple courses of action and ultimately make independent recommendations to best suit their clients' financial needs.

In 2010, the DOL informally declared by "administrative interpretation" that mortgage loan officers do *not* qualify as bona fide administrative employees. Reversing itself, the DOL reasoned that mortgage loan officers follow explicit instructions and policies regarding the approval or denial of loans and exercise virtually no independent judgment or discretion. Mortgage loan officers were likened by the DOL to sales-related positions whose primary duties do not relate to the general business of the employer or its customers.

The Mortgage Bankers Association (MBA), representing more than 2,200 real estate finance companies nationwide, challenged the DOL's unilateral decision to reverse its 2006 interpretation of the administrative exemption by an informal administrative interpretation. The MBA argued that the DOL's administrative interpretation was void because it did not propose the rule change to the public and allow for a notice-and-comment period. The court agreed with the MBA and found that the DOL's 2010 interpretation was void. Notably for credit unions, the DOL's 2006 position (advising that



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WHD Special Report
July 2013

mortgage loan officers are exempt from overtime requirements) remains in full force and effect. The court did not address the merits of the DOL's 2010 opinion but made clear that the DOL, if it wishes to modify its interpretation of the administrative exemption to mortgage loan officers, has to undergo formal rulemaking procedures, including the public notice-and-comment period.

In light of this ruling, under federal overtime law, credit unions do not have to pay mortgage loan officers overtime if they otherwise meet the administrative exemption requirements. Credit unions should conduct an individualized analysis to determine if mortgage loan officers, as well as loan underwriters, credit analysts, loan processors and insurance agents are in fact exempt from overtime requirements under applicable state law and federal law. Some states have laws that

are more beneficial to employees in terms of narrower exemptions for overtime qualification. For a federal exemption to apply, an employee's specific job duties and salary must meet all of the DOL's requirements.

Although the DOL is not appealing the court's decision, credit unions should proceed cautiously as the DOL may choose to formally modify its 2006 interpretation of the administrative exemption and its application to mortgage loan officers by issuing a proposed rule and undergoing the public notice-and-comment period.

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