



# Mortgage Loan Officers are Exempt From Wage and Hour Laws Again—For Now

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The D.C. Circuit Court of Appeals has vacated the U.S. Department of Labor's 2010 guidance that stated that most mortgage loan officers are not exempt from minimum wage and overtime compensation under the Fair Labor Standards Act ("FLSA"), leaving the financial services industry unsure of how to classify their mortgage loan officers.

Over the past few years, financial institutions have had some considerable confusion about whether their mortgage loan officers should be considered exempt or non-exempt employees under the FLSA. In a 2006 Opinion Letter, the U.S. Department of Labor opined that most mortgage loan officers were exempt under the administrative exemption. Then, in 2010, the Department of Labor issued an Administrator's Interpretation withdrawing the 2006 opinion, stating that mortgage loan officers were *not* exempt since their primary duty was generally sales, which does not fall under the administrative exception. As a result of this Interpretation, many financial services institutions either changed the exempt status of their mortgage loan officers, or attempted to change the duties of their mortgage loan officers such that their duties fell into a different category of exemption, such as the outside sales exemption. The D.C. Circuit Court of Appeals has now vacated the 2010 Administrative Interpretation because it was not properly promulgated. *Mortgage Bankers Assoc. v. Harris*, No. 1:11-cv-00073 (D.C. Cir. July 2, 2013).

The Court's decision took no position on the merits of either the 2006 or 2010 interpretation. Instead, the Court held that the 2006 Opinion Letter was a "definitive interpretation" of the FLSA regulations, and that the 2010 Interpretation constituted a "significant revision" of that interpretation, requiring formal rulemaking procedures, including the public notice-and-comment period, prior to implementation. Thus, the 2010 Interpretation has been vacated, leaving the 2006 Opinion Letter as the official DOL interpretation of the FLSA regulations on Mortgage Loan Officers.

In light of the Court's ruling in this case, it would appear that financial services institutions may classify their mortgage loan officers as exempt employees, if they meet the administrative exemption requirements. It is possible that the DOL will formally and properly adopt the 2010 Interpretation with regard to mortgage loan officers, so financial services institutions must not only carefully analyze the duties of the mortgage loan officers, but must also pay careful attention to future DOL rulemaking.

One thing is clear: there must be a careful, individualized analysis for each position to determine whether the requirements for exemption are met, including:

1. The employee must be compensated on a salary or fee basis as defined in the regulations at a rate not less than \$455 per week (that's Federal law; under New York State law, the minimum is \$543.75);
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. 29 C.F.R. § 541.200.

The key is whether the employee's primary duty involves sales or something else. If the employee is primarily involved in sales, he is generally not exempt under the administrative exemption. However, if the employee is primarily involved in collecting and analyzing data, determining which products best meet a customer's needs, advising customers, marketing, servicing and promoting the employer's products, then the employee appears to be exempt, even if the position also involves sales.

Even if mortgage loan officers are not exempt under the administrative test, they may still be considered exempt under the outside sales employee exemption. Mortgage loan officers can qualify as an exempt outside salesperson if:

- The employee's primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee is customarily and primarily engaged away from the employer's place of business in performing such duties.

The phrase "customarily and primarily engaged away from the employer's place of business" means that the employee makes sales at the customer's place of business or home. Outside sales does not include sales by mail, telephone, or e-mail, unless those are used merely as an adjunct to personal calls. Promotional work and other work may be performed if it is incidental to the outside sales and not generally directed towards the sales of the company. Mortgage loan officers who genuinely work away from the office most of the time will qualify under this exemption. It is necessary to examine the job duties of the employee to determine this.

Some employers have also argued that mortgage loan officers qualify as exempt under the commissioned salesperson exemption. However, several courts have rejected this proposition, holding that financial companies who sell mortgages are not retail or service establishments, which is the first requirement of the test.

We will continue to update you as more information becomes available, or if the DOL takes any action in response to the Court's ruling. If you have questions about how to classify your employees, or anything else related to employment law, please feel free to contact one of the attorneys in our Labor and Employment department.

## Practices

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