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D.C. Federal Court Upholds DOL 2010 Flip-Flop on Exempt Status of Mortgage Loan Officers Under FLSA

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Revised Ruling Awards Overtime to Loan Officers; May Affect More Than 250,000 Employees Nationwide

Employers: beware when relying on Department of Labor Wage and Hour Division Opinion Letters. Even better, don't rely on them.

In the latest in a series of flip-flops, the Department of Labor (DOL) unilaterally changed course in March 2010, withdrawing its ***September 2006 Opinion Letter*** to the Mortgage Bankers Association (MBA) affirming that certain mortgage loan officers were "administrative" employees and therefore exempt from the overtime and recordkeeping requirements of the Fair Labor Standards Act (FLSA). ***Administrator's Interpretation No. 2010-01***. The specific loan officers covered by the Opinion Letter spent less than half their time working on "customer-specific persuasive sales activity." Absent an exemption, employers must pay these loan officers overtime for all hours worked over 40 in a workweek and record and maintain supporting documentation. The Bureau of Labor Statistics reports that there were some 289,000 loan officers employed in 2010.

In its revised March 24, 2010 Administrative Interpretation, the DOL concluded that the typical mortgage loan officer's primary duty is actually making sales for the employer to homeowners, a duty which does not support the FLSA administrative exemption. That same day, the DOL discontinued its 46-year practice of issuing Opinion Letters.

In January 2011, the MBA challenged the revised DOL policy in D.C. federal court, specifically targeting the DOL's failure to engage in a rulemaking process, including a notice and comment period, and alleging the new interpretation was arbitrary, capricious, an abuse of discretion and outside the FLSA and its 2004 regulations. The MBA asked the court to block implementation of the changed interpretation.

Judge Reggie B. Walton was persuaded by the DOL's arguments that its 2010 position was not inconsistent with the 2004 FLSA regulations. In his June 6, 2012 ***Memorandum Opinion*** in *Mortgage Bankers Ass'n v. Solis*, the court also found that four years of reliance on the Opinion Letter and the resultant loss of loan officers' abilities to control their work hours and break times under the 2010 interpretation was not the kind of "substantial and justifiable reliance on a well-established agency interpretation" required to overturn the 2010 interpretation.

The MBA and the DOL agreed that the court need not rule on whether this ruling has retroactive effect, and the court declined to do so.

Left unchallenged is a ***2006 DOL Opinion Letter*** (FLSA2006-11) that "sales force" mortgage loan officers who perform their job duties "primarily outside the employer's offices" qualify for the outside sales exemption under the FLSA.