

July 8, 2013

New Decision Continues Uncertainty Over Exempt Status of Mortgage Loan Officers

On July 2, 2013, the U.S. Court of Appeals for the D.C. Circuit released its decision in [Mortgage Bankers Association v. Harris](#), addressing the issue of whether mortgage loan officers are exempt from overtime.

The decision focused on inconsistent positions taken by the U.S. Department of Labor (DOL), the agency that administers and interprets the Fair Labor Standards Act (FLSA). In 2006, the DOL issued an opinion letter, stating that most mortgage loan officers qualified as exempt administrative employees under the FLSA. Thus in the DOL's view, banks and other financial institutions were not required to pay those employees overtime compensation for hours worked in excess of 40 in the week.

In 2010, however, the DOL reversed its position, releasing an "Administrator's Interpretation" that declared that employees who perform the typical job duties of a mortgage loan officer do not qualify as administrative employees and therefore are entitled to overtime pay.

The Mortgage Bankers Association (MBA) sued the DOL, attacking the 2010 Administrator's Interpretation. The MBA argued that the DOL failed to provide public notice or engage in the rulemaking process that ordinarily accompanies a change in agency position. Last week, the Court of Appeals ruled in favor of the MBA, invalidating the 2010 Administrator's Interpretation.

The ruling did not settle the issue of the exempt status of mortgage loan officers. Instead, uncertainty will continue, for several reasons:

- The Court of Appeals did not decide whether mortgage loan officers are or should be exempt. Instead, the Court only determined that the 2010 Administrator's Interpretation was invalid. The DOL could start the rulemaking process and properly issue new rules or regulations that repeat the 2010 Administrator's Interpretation.
- In the meantime, it remains unclear whether courts will defer to the 2006 opinion letter, rather than relying on court decisions from the past three years.
- Not all mortgage loan officers are the same. The application of the administrative exemption depends upon the employee's job duties. The question is whether the employee's "primary duty" includes the "exercise of discretion and independent judgment" with respect to "matters of significance."

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– The method of compensation also affects the exempt status of an employee. Unless the employee is paid on a “salary or fee basis,” he or she cannot be an exempt administrative employee.

If you have questions about the exempt status of your employees or any other employment or labor issue, please contact the Foster Pepper [Employment & Labor](#) practice group.

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