

Special Alert for Financial Institutions: Mortgage Loan Officer Doesn't Meet Administrative Exemption

Your World Just Got More Confusing

As if your HR world isn't perplexing enough, the Department of Labor (DOL) has abandoned its former position (Opinion Letter, FLSA 2006-31) that mortgage loan officers could potentially qualify as exempt employees under the Administrative test of the Fair Labor Standards Act. In a new "Administrator's Interpretation" the DOL concludes that the earlier Opinion was based on an inappropriate assumption, that mortgage loan officers provide work directly related to an organization's business operations. The consequence for employers is that mortgage loan officers will *generally* be required to be treated as nonexempt and paid overtime.

Oh No, Not the Dreaded FLSA Exemption Tests!

You'll recall that to qualify as exempt from overtime under the Fair Labor Standards Act, an employer must show that a position meets one of several exemption tests: executive, administrative, professional, outside sales or computer related. In the past financial organizations may have been able to demonstrate that mortgage loan officers were exempt from overtime requirements by showing that they met the requirements of the Administrative test (mortgage loan officer positions typically wouldn't meet any of the other tests).

To qualify under the **Administrative exemption**:

1. An employee must be compensated on a salary or fee basis at no less than \$455/week.
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 includes the exercise of *discretion and independent judgment with respect to matters of significance*.

Buckle Up for the DOL's Decision

In considering whether the "average" mortgage loan officer meets the Administrative exemption, the DOL looked at the second part of the test. It found that since loan officers are responsible for the sale of loans (and supporting functions), they are more like production workers rather than staff employees, (such as accounting, HR, purchasing, etc.,... positions which may qualify under the Administrative test.) In other words, their work didn't relate to the "management or general business operations" of the employer. A number of federal courts have come to the same conclusion. The DOL didn't consider the issue of whether such a position exercised sufficient "discretion and independent judgment" to meet the exemption test.

What Does This Mean for Me and Why Should I Care?

The Fair Labor Standards Act is difficult for even the most seasoned HR person to apply. Logic isn't always useful and the complex FLSA often makes little sense in our modern, high tech world. However, failure to act in accordance with the Act can be very costly in terms of dollars, bad publicity, or employee trust.

Therefore, employers should regularly review their exemptions and audit FLSA related practices. The DOL construes exemptions very narrowly, which benefits employees, making more of them nonexempt than most organizations realize.

As a result of these developments, financial organizations should review their exempt/nonexempt treatment of loan officers. If you haven't looked at all of your positions lately (especially those in "gray areas"), now is a good time to do so. Remember that job title is not determinative and these decisions are made on a case-by-case basis. Also, it may be a good idea to take a look at your compensation practices and policies generally. And, don't forget your state law. It may impose additional wage and hour requirements.

For more information on the Fair Labor Standards Act and the exempt tests in particular, go to:

<http://www.dol.gov/whd/regs/compliance/fairpay/main.htm> .

The Administrator's Interpretation regarding mortgage loan officers is found at:

<http://www.dol.gov/WHD/opinion/adminIntrprtnFLSA.htm>.

HRN Management Group Can Help

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