



REGULATORY COMPLIANCE OUTLOOK:

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Mortgage Loan Officers Lose Administrative Exemption

In an Administrator's Interpretation (Interpretation),¹ issued March 24, 2010, the U. S. Department of Labor (DOL) determined that employees who perform the typical duties of a mortgage loan officer have a primary duty of making sales for their employers and, therefore, do not qualify as bona fide administrative employees exempt under the Fair Labor Standards Act (Act).²

Accordingly, mortgage loan officers are subject to minimum wage and overtime requirements.

Administrator's Interpretation

The Interpretation applies to employees who:

- ❖ Spend the majority of their time working inside their employer's place of business, including employees who work in offices located in their homes, rather than mortgage loan officers who are customarily and regularly engaged away from their employer's place of business; and
- ❖ Do not spend the majority of their time engaging in "cold-calling," contacting potential customers who have not in some manner expressed an interest in obtaining information about a mortgage loan.

By issuing this Interpretation, the DOL has now rejected its own Sept. 8, 2006 Wage and Hour Opinion Letter FLSA 2006-31, asserting that its previous position provided an "inappropriately narrow definition of sales" as including only customer-specific persuasive sales activity (i.e., the time that a mortgage loan officer spends directly engaged in selling mortgage loan products to customers).³

Exempt versus non-exempt

The Act identifies two types of employees: non-exempt employees and exempt employees:

- ❖ **Non-exempt employees** are employees who, based on the duties performed and the manner of compensation, are required to account for time worked and sick leave, vacation, and other leave on an hourly and fractional hourly basis. The Act requires that these employees be paid overtime at the premium (time-and-one-half) for actual time worked in excess of 40 hours per week.
- ❖ **Exempt employees are employees** who, based on the duties performed and the manner of compensation, are exempt from the Act's minimum wage and overtime provisions. Exempt employees are paid an established monthly or annual salary and are expected to fulfill the duties of their positions regardless of the hours worked. They do not receive premium overtime, straight overtime or compensatory time for working more than 40 hours in a work week.

To be considered "exempt" from the Act's requirements, employees must meet two tests: the Salary Basis Test and the Duties Test. The Act has a number of white collar exemptions from overtime and minimum wage. Changes made to the Act in August 2004 modified these tests, compelling an examination of how to classify and pay mortgage loan officers. Eligibility for these exemptions is based on the primary duties of their job functions and their weekly salary.

Table of certain white collar exemptions

The August 2004 revisions to the Act elucidated the requirements for certain white

collar exemptions. The following table provides a brief synopsis, with salary requirements, of those revisions:⁴

Executive employees		
	Pre-August '04 rule	Beginning August '04
Minimum compensation	\$250 qualified weekly salary	\$455 qualified weekly salary
Duties required	<ul style="list-style-type: none"> • Primary duty consists of management of enterprise or recognized department or subdivision thereof; and • Customarily and regularly directs work of two or more other employees. 	<ul style="list-style-type: none"> • Same • Same • Authority to hire/fire other employees (or suggestions about hiring/firing/promotion/other status changes given particular weight).
Administrative employees		
	Pre-August '04 rule	Beginning August '04
Minimum compensation	\$250 qualified weekly salary	\$455 qualified weekly salary
Duties required	<ul style="list-style-type: none"> • Primary duty consists of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers; and • Includes work requiring exercising discretion and independent judgment. 	<ul style="list-style-type: none"> • Same • Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
Outside sales employees		
	Pre-August '04 rule	Beginning August '04
Minimum compensation	None	Same
Duties required	<ul style="list-style-type: none"> • Employed for the purpose of, and customarily and regularly engaged away from the employer's place of business in, making sales; or in obtaining orders or contracts for services or for the use of facilities; and • Devotes no more than 20 percent of hours worked by nonexempt employees to activities not incidental to and in conjunction with employee's own outside sales or solicitations. 	<ul style="list-style-type: none"> • Primary duty of making sales, or obtaining orders or contracts for services or use of facilities; and • Customarily and regularly engaged away from the employer's place of business.
Highly compensated employees		
	Pre-August '04 rule	Beginning August '04
Minimum compensation	No such exemption	\$100,000/year (including minimum weekly salary of \$455)
Duties required	<ul style="list-style-type: none"> • No such exemption 	<ul style="list-style-type: none"> • Non-manual or office work • Customarily and regularly performs one or more exempt duties or responsibilities of an executive, administrative or professional employee.

Exemption test

Under the Interpretation, to fall within the meaning of an "employee employed in a bona fide administrative capacity" (therefore, exempt) an employee's job duties and compensation must meet all of the following tests:

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;
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.

The DOL, contending that the second test (listed above) does not apply to mortgage loan officers, argues that the typical, primary duty of the mortgage loan officer is sales, not office or non-manual work directly related to the management or general business operations of their employer or their employer's customers.

Mortgage loan officer is a salesperson

Although mortgage loan officers compile and analyze potential customers' financial data, they do so because doing so is necessary to evaluate the customers' qualifications for a loan (in order to consummate a sale); that is, the DOL's position is that mortgage loan officers are not analyzing the customers' information to provide advice to the customer, which the customer could take and use elsewhere, but performing "screening" for the benefit of the employer, rather than servicing for the benefit of the customer.

In determining whether an employee's primary duty is making sales, the DOL's view is that work performed incidental to sales should also be considered sales work.

An employee who performs the typical duties of a mortgage loan officer, as defined by the Department, does not qualify for exempt status as bona fide administrative employees. In short, the Interpretation's position is that a mortgage loan officer's primary duty is sales and not the management or general business operation of the employer.

Salary arrangements

In structuring salary arrangements to meet the \$455/week, the issue of commissions and draws must be considered.⁵ The general rule is that an exempt employee may be paid solely on a commission basis if the payments for each work week are sufficient to meet the salary basis requirement for that work week. A draw may

not reduce an employee's earning to below the salary basis requirement for hours worked. Additionally, commissions may not be used for weeks other than when earned as a means of making up amounts in a different week where commission earnings are insufficient to meet the statutory amount.

The Act permits an agreement between an employer and employee which provides that the employee will receive the statutory amount for all hours worked along with any additional amount by which commissions may exceed the statutory amount required. It appears that a monthly commission period may be utilized; however, the computation and recording of hours must be on a work week basis.

Submit your questions ...

Do you have a regulatory compliance issue that you'd like to see addressed in the Regulatory Compliance Outlook Column? If so, e-mail your issue or concern to Jonathan Foxx at jfoxx@lenderscompliancegroup.com.

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Footnotes

1—Administrator's Interpretation 2010-1, Department of Labor. (This is the first Administrator's Interpretation ever issued by the DOL.)

2—See: 29 U.S.C. § 213(a)(1).

3—The withdrawn opinion letter is Opinion Letter FLSA 2006-31. (Also withdrawn was a previously supporting interpretation Opinion Letter: FLSA 2001 WL 1558764.)

4—The analysis of this article pertains to federal law. State law and licensing requirements must also be considered in determining how to classify employees. In addition, the Federal Reserve Board is considering a proposal to eliminate compensation based on the "terms" of the loan.

5—A mortgage loan officer who cannot satisfy the administrative exemption may still satisfy the highly compensated employee exemption by "customarily and regularly" performing at least one of the exempt responsibilities associated with the three exemption criteria for that category.