

The Ongoing Battle *Over* **Overtime**

BY WILLIAM J. CARROLL

The Department of Labor opened the floodgates to class-action suits when it reversed an interpretation of how loan officers are classified when it comes to overtime pay. Subsequent court rulings have made the outlook even more murky.

Employers in the mortgage-lending arena continue to be targeted by a burgeoning cottage industry of wage-and-hour plaintiff's attorneys intent upon filing class actions. The suits being filed claim that exempt employees have been misclassified and are owed unpaid overtime. ● Recent developments have thickened the plot in this ongoing saga. Federal regulators reversed course on earlier opinions that were helpful to mortgage industry employers. And in another development, a federal appellate court issued a decision that flies in the face of established industry practices. ● The legal fray, which at one time focused on challenges to loan officer classification, has now spread to include underwriters. ● Mortgage lending institutions, brokers and other industry players are well advised to stay abreast of these changes and adjust their best practices and compliance programs as needed, lest they join the expanding ranks of industry employers called upon to defend their classification decisions in class-action litigation.

The federal government's shifting views on loan officers

Under the federal Fair Labor Standards Act (FLSA), employees are owed an overtime premium (one and one-half times the employee's regular rate of pay) for each hour worked in excess of 40 in a work week—unless the employee falls within a recognized exemption.

Employers in the mortgage industry, large and small, have routinely classified loan officers as exempt employees. In the past, support for the exempt classification could be found, among other places, in a September 2006 opinion letter in which the U.S. Department of Labor (DOL) concluded that mortgage loan officers generally qualified for the "administrative exemption."

This exemption applies to employees who are paid at least \$455 per week and are primarily engaged in the performance of "administrative" work. Such work consists of non-manual work directly related to the management or general business operations of the employer or its customers.

In order to qualify for the exemption, the employee's administrative work must require the exercise of discretion and independent judgment with respect to matters of significance. In its 2006 opinion letter, the DOL concluded that loan officers qualified for the administrative exemption because "they have a primary duty other than sales," and performed administrative work including analyzing customers' financial information, advising customers about the risks and benefits of various mortgage loan alternatives, and advising customers about avenues to obtain more advantageous loan programs.

This conclusion was consistent with a 2001 DOL opinion letter, where the agency similarly concluded that activities such as advising borrowers on the selection of a loan package qualified as exempt administrative work.

This regulatory landscape shifted suddenly in March

2010, when the DOL issued an interpretation memo determining that "typical" mortgage loan officers do not qualify for the FLSA's administrative exemption. In this Administrator's Interpretation (AI), the DOL places heavy emphasis on the issue of whether a loan officer's work is "administrative" in nature—that is, whether it relates to the running of the business itself, as opposed to the production of goods or services offered by the business.

In the current view of the DOL, because a typical loan officer is engaged principally in production activities such as sales and servicing customers, rather than administrative activities aimed at the internal management of the business, loan officers fall under the "production side of the business" and are not covered by the administrative exemption. The AI officially withdraws both the 2006 and the 2001 DOL opinion letters referenced here, each of which had expressed contrary views.

The DOL's reversal of its prior position has given rise to some well-founded consternation in the mortgage banking community.

In January 2011, the Mortgage Bankers Association (MBA) filed a lawsuit, challenging the AI's validity under the Administrative Procedure Act. That suit remains pending. Should the AI survive this challenge, it remains unclear how much weight courts will give it. The DOL's views as published in opinion letters and administrative interpretations are not binding on the courts, although judges frequently defer to them as persuasive authority.

In the meantime, however, it is clear that the safe harbor for mortgage loan officers created by the DOL's 2006 opinion is no longer available. To that extent, at least, an employer's classification of a mortgage loan officer as an exempt administrative employee may be subject to challenge.

Outside salesperson exemption still available

It is important to note that the AI does not purport to change DOL's stance with regard to exemptions other than the administrative exemption. For example, the "outside salesperson exemption" continues to furnish an alternative basis for exempting loan officers from FLSA requirements.

To be eligible for this exemption, an employee must be primarily engaged in sales activity and must "customarily and regularly" engage in the sales activity away from the employer's place of business. The DOL regulations explain that "outside sales" do not include sales by mail, telephone or the Internet, unless such contacts are used as an adjunct to in-person sales calls.

Further, any "fixed site," whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business. Thus, sales solicitations conducted from the employee's own home office would generally be deemed to have occurred at the "employer's place of business" under the regulations.

Employers will often have a ready basis for establishing that a loan officer's primary duty consists of sales. Indeed, the AI draws that very conclusion for "typical" loan officers.

The more difficult showing is, in many cases, whether the loan officer is "customarily and regularly" engaged away from the employer's place of business in engaging in such sales. Where that showing can be made, either through routine appointments at clients' homes or regular outside meetings with referral sources or otherwise, the outside salesperson exemption will likely apply.

For example, in a March 2006 opinion letter responding to an inquiry by the National Association of Mortgage Brokers (NAMB), Plano, Texas, the DOL concluded that certain mortgage loan officers who "customarily and regularly" met with prospective clients at locations other than the employer's business (such as a client's home) and regularly made in-person calls on real estate agents and other potential referral sources were exempt outside sales employees.

The DOL also noted that the loan officers could qualify for the outside sales exemption even though they performed certain activities at the employer's place of business, "so long as the inside sales activity is incidental to and in conjunction with qualifying sales activity."

Underwriters' exempt status under fire

Unlike loan officers, underwriters rarely engage in sales activities as a primary duty. For this and other reasons, underwriters have, for the most part, remained on the sidelines of the overtime wars.

That status changed, unfortunately, with the November 2009 release of a federal appellate court's opinion in *Davis v. J.P. Morgan Chase & Co.* There, the U.S. Second Circuit Court of Appeals overturned a lower court ruling

holding that the defendant's mortgage underwriters were properly classified as exempt administrative employees. In reversing that decision, the Second Circuit concluded that the underwriters were more accurately characterized as "production" rather than "administrative" employees.

The court focused on the role played by underwriters in producing mortgage loans, likening the underwriters to "production workers" who exercised relatively little discretion and independent judgment, and who received incentive payments based on the quantity of loans underwritten.

The *Davis* decision is binding in the three states that comprise the Second Circuit—New York, Connecticut and Vermont. The decision's emphasis on the administrative-production dichotomy is at odds with the positions taken by several other federal circuits. It remains to be seen whether courts in other circuits will, under the facts presented in other cases, follow the Second Circuit's lead in classifying mortgage underwriters as non-exempt "production workers."

In the meantime, however, a spate of class and collective actions have been filed by mortgage underwriters in several states, each claiming misclassification and denial of overtime pay, and each seeking certification of nationwide classes.

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Wage-and-hour litigation: Risks for both sides

With the current uncertainties surrounding the scope of the administrative exemption as applied in the financial services industry, it is unlikely the barrage of class-action lawsuits brought by loan officers claiming unpaid overtime will abate anytime soon. Settlements in these cases have reached into the eight figures, with one institution recently agreeing to pay \$20 million to resolve overtime claims brought by a nationwide class of mortgage consultants.

However, in a growing number of cases, employers have succeeded in defending against class actions on procedural grounds by demonstrating that class treatment is unjustified.

Determination of whether a loan officer falls within the administrative exemption requires consideration of a range of factors, including the degree of discretion and independent judgment exercised by the loan officer, which may vary from individual to individual. The availability of the outside salesperson exemption may also depend upon facts that are unique to the individual, including how regularly he or she holds meetings outside of the employer's office.

Where loan officer activities vary within a company, thereby requiring an individualized look at how a given loan officer spends his or her time, the plaintiffs' bid for class certification may be denied, leaving loan officers to pursue their separate claims individually. In one noteworthy case, a federal district court in California refused to certify a nationwide class consisting of thousands of mortgage loan consultants, concluding that individualized

inquiries into how much time each loan officer spent in or out of the office would “overwhelm” any attempt to adjudicate the claims on a class-wide basis.

Where plaintiffs succeed in certifying a class, most cases result in settlements. A notable exception occurred in March 2011 in *Henry v. Quicken Loans Inc.*, where the case proceeded through trial in a federal court in Detroit and resulted in a jury verdict rejecting overtime claims brought by a class of more than 300 mortgage loan consultants.

The jury found that Detroit-based Quicken’s loan officers were primarily engaged in administrative work—a finding that directly contradicts the conclusion reached by the DOL in its 2010 Administrator’s Interpretation.

The jury’s verdict has limited precedential force, and remains subject to appeal. Nevertheless, Quicken’s important victory in this hotly contested litigation suggests that other juries may be similarly persuaded, thereby giving pause to plaintiffs’ counsel and potentially decreasing settlement values in similar cases.

Minimizing exposure to class-action claims

Unfortunately, the mortgage industry remains firmly fixed in the sights of plaintiff’s wage-and-hour class-action lawyers, who continue to challenge the classification of loan officers, underwriters and other exempt employees. Given the cost and disruption such litigation entails, industry employers are well advised to undertake proactive measures designed to head off class-action complaints before they are filed.

Compliance programs

There is no substitute for a strong compliance program. Review of employee classifications should occur as part of a broader audit of wage and hour practices, including review of wage payment and time-keeping practices, policies and practices regarding meal and rest breaks, compensation for training and travel, policies prohibiting “off-the-clock” work by non-exempt employees, vacation accrual, calculation of overtime and other key areas.

The review of employee classifications should go beyond the written job description and consider the employee’s actual duties and activities, including variances that may occur within a given job title. Involvement of legal counsel in such reviews can help to ensure compliance with current law, as well as undermine any subsequent claim that the employer acted willfully in any alleged misclassification—a claim that, if sustained, could result in an award of double damages under the FLSA’s liquidated damages provision.

For some companies, the advantages of maintaining exempt status for a category of employees may be outweighed by uncertainties arising from the shifting legal landscape and the attendant risks of litigation or government enforcement. A decision to reclassify such employees to non-exempt status may be the right one in some cases, but it should never be made without a thorough

evaluation of the pros and cons. A range of strategies is available for limiting the financial and administrative burdens posed by reclassification, and for minimizing the potential risk of litigation. Careful planning and able counsel are a must.

Arbitration agreements

Companies may enter into enforceable pre-dispute arbitration agreements with their employees, requiring that all disputes—including claims for unpaid wages or overtime—be resolved through binding arbitration.

Such agreements may contain a provision requiring that any claim must be brought on an individual basis, and not as part of a class action. These provisions, commonly referred to as “class-action waivers,” may reduce an employer’s exposure to wage-and-hour and other employment-related class actions by requiring that such claims be arbitrated on an individualized, case-by-case basis. The existence of an enforceable class-action waiver is a powerful deterrent to the would-be plaintiff’s class-action lawyer, who may have little interest in pursuing multiple individual claims, each in a separate arbitration.

Plaintiff’s lawyers have vigorously attacked the enforceability of class-action waivers, and courts have in some cases refused to enforce them, citing various state law restrictions. However, the U.S. Supreme Court’s April, 2011, ruling in *AT&T Mobility LLC v. Concepcion* furnishes a significant boost to employers who wish to rely on such waivers.

In *Concepcion*, the Supreme Court upheld the enforceability of a class-action waiver contained in arbitration agreements between Dallas-based AT&T and purchasers of its cell phones. The court held that state law restrictions must yield to the Federal Arbitration Act, a federal statute that embodies a strong policy favoring arbitration of disputes.

Concepcion is a landmark ruling, which has already resulted in dismissal of several class-action cases by the lower courts. While *Concepcion* did not address the employment setting directly, the court’s reasoning furnishes strong support for

employers seeking to enforce class-action waivers in arbitration agreements with their employees.

Employers who currently use arbitration agreements should consider adding explicit class-action waivers to these agreements. Employers who do not have current arbitration programs should weigh the disadvantages against the advantages of arbitration, including the potential for minimizing exposure to class-action claims. **MB**

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