



## D.C. Circuit Vacates DOL Administrative Interpretation Regarding Loan Officer Exempt Status

By: Kimberly F. Williams

The D.C. Circuit Court of Appeals recently vacated the Department of Labor's ("DOL") 2010 Administrative Interpretation, which declared that mortgage loan officers did not qualify for the administrative exemption from overtime pay under the Fair Labor Standards Act ("FLSA"). This July 2, 2013, ruling is a victory for the mortgage industry, which struggled with whether to classify its mortgage loan officers as exempt or non-exempt employees under the FLSA following the 2010 Administrative Interpretation.

In 2006, the DOL issued an opinion letter concluding that mortgage loan officers fell within the administrative exemption and were, therefore, not subject to the FLSA's minimum wage and overtime requirements. In 2010, the DOL reversed its position and issued an Administrative Interpretation declaring that "employees who perform the typical job duties" of a mortgage loan officer do not qualify for the administrative exemption. The 2010 Administrative Interpretation withdrew the 2006 opinion letter. The DOL issued the Administrative Interpretation without notice and comment rulemaking.

The Mortgage Bankers Association ("MBA") filed suit against the DOL, challenging the "DOL's decision to change their 'definitive interpretation' without first undergoing notice-and-comment rulemaking as a violation of the [Administrative Procedure Act]." The D.C. District Court denied the MBA's motion for summary judgment, holding that notice and comment rulemaking was not required.

The MBA appealed the decision. At issue in the appeal was whether the MBA was required to establish substantial and justified reliance on the opinion letter. The DOL argued that reliance is an element that must be established before notice and comment rulemaking is required. During oral argument, the DOL acknowledged that the MBA prevailed if the Court found that reliance was not a separate element, but rather a factor used to determine if a definitive interpretation exists.

The D.C. Circuit reversed the District Court's decision and remanded the case with instructions to vacate the 2010 Administrative Interpretation. In its ruling, the D.C. Circuit Court held that reliance is not a separate and independent element in determining whether the Administrative Procedure Act's notice and comment procedures are required to change an agency interpretation



of a regulation. Instead, “reliance is but one factor courts must consider in assessing whether an agency interpretation qualifies as definitive or authoritative.”

Importantly, the D.C. Circuit did not address the merits of the Administrative Interpretation, stating: “If the [DOL] wishes to readopt the later-in-time interpretation, it is free to. We take no position on the merits of their interpretation. DOL must, however, conduct the required notice and comment rulemaking.” It is unclear how the DOL will proceed in light of the D.C. Circuit’s opinion, but the good news is that, should the DOL wish to reissue the Administrative Interpretation, it will have to give interested persons, including the MBA, the ability to participate in the rulemaking process.

Although the D.C. Circuit vacated the 2010 Administrative Interpretation, we recommend that mortgage industry professionals proceed with caution before designating loan officers as exempt employees. Employers should conduct a thorough review of the loan officers’ actual job duties to ensure that the duties meet the requirements for the administrative exemption and are consistent with the facts set forth in the 2006 opinion letter. Because this analysis can often be confusing, we recommend consulting with legal counsel when appropriate.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the author:

**Kimberly F. Williams** | 214-740-8589 | [kwilliams@lockelord.com](mailto:kwilliams@lockelord.com)