



## DC Circuit Invalidates U.S. Department of Labor Interpretation Regarding Mortgage Loan Officer Eligibility for Overtime Pay

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In recent years, financial companies have faced uncertainty over wage requirements for mortgage loan officers because the U.S. Department of Labor has taken inconsistent positions on whether they are eligible for overtime pay.

The DOL initially issued an opinion letter on September 8, 2006, stating that loan officers typically qualify as exempt from overtime pay under the administrative exemption. After a change of administrations, the DOL reversed itself on March 24, 2010, and issued an administrator's interpretation withdrawing its 2006 opinion and stating oppositely that loan officers typically do not qualify for that exemption.

In 2011, the Mortgage Bankers Association sued the DOL and challenged the validity of its 2010 interpretation. On July 2, 2013, the DC Circuit Court of Appeals upheld the challenge, and issued a decision in *Mortgage Bankers Association v. Harris* invalidating the DOL's 2010 interpretation.

Although *Mortgage Bankers Association* does not conclusively resolve the issue of whether loan officers qualify as exempt from overtime pay, it is a favorable outcome for the financial services industry and potentially has broad procedural implications regarding federal agency rulemaking.

### The Mortgage Bankers Association Decision

In *Mortgage Bankers Association*, the DC Circuit ruled that the DOL's 2006 opinion letter supporting the overtime exemption for loan officers was a definitive interpretation that could not be significantly revised absent compliance with the Administrative Procedures Act, which requires notice and comment. The DOL did not follow that protocol in issuing its contrary 2010 interpretation, so it is invalid.

The court was critical of what it characterized as "agency flip-flops," but declined to rule on the merits of either of the conflicting interpretations in 2006 and 2010. The court stated that if the DOL wants to readopt its 2010 interpretation following the requisite notice and comment rulemaking under the Administrative Procedures Act, the DOL is free to do that.

Companies should be aware that *Mortgage Bankers Association* does not necessarily mean that loan officers now qualify as exempt from overtime pay. Courts will continue to apply overtime exemption requirements on a case by case basis, as provided in federal regulations and some state laws—such as California, which has its own state law overtime exemption requirements set forth in industry wage orders.

That said, *Mortgage Bankers Association* does eliminate any deference a court may have given to the DOL's now invalid 2010 interpretation, unless and until the DOL engages in notice and comment rulemaking under the Administrative Procedures Act to readopt it.

*Mortgage Bankers Association* may also open the door to argue that the DOL's 2006 opinion letter once again has persuasive value in interpreting federal overtime laws, on the basis that per *Mortgage Bankers Association* it is a definitive interpretation that has not been validly amended.

### Potential Broad Procedural Implications Regarding Federal Agency Rulemaking

*Mortgage Bankers Association* also may have significance beyond the financial services industry, because it furthers a trend of disfavoring agency opinions that take inconsistent positions or reinterpret regulations as political winds shift direction.



In 2012, the U.S. Supreme Court issued a decision in *Christopher v. SmithKline Beecham*, refusing to defer to the DOL after it provided inconsistent analyses of overtime eligibility of pharmaceutical sales representatives. The Court observed: "Our practice of deferring to an agency's interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purpose of rulemaking."

*Mortgage Bankers Association* takes the notice and predictability purpose of rulemaking a step further, by requiring federal agencies to follow the Administrative Procedures Act if they want to significantly revise a previously issued definitive interpretation. An agency's interpretation of rules such as overtime exemptions may evolve over time, but as courts recognize, such changes should be implemented in a manner that provides notice and predictability. *Mortgage Bankers Association* furthers that objective.

### Next Steps

While *Mortgage Bankers Association* is a welcome development, companies that employ mortgage loan officers should proceed cautiously because the law is still emerging.

First, the DOL might seek further review of the *Mortgage Bankers Association* decision, either *en banc* review by the DC Circuit or review by the U.S. Supreme Court. If so, the validity of the 2010 interpretation will be in limbo until all opportunities for further review are exhausted. In the event of further review, companies wanting to weigh in can petition to file amicus briefs.

Second, the DOL might issue a Notice of Proposed Rulemaking to readopt its 2010 interpretation under the Administrative Procedures Act, in which case the DOL will set a time period for receiving comments. If

that occurs, companies wanting to weigh in can submit comments accordingly.

Third, even in the absence of further court review of *Mortgage Bankers Association* or DOL notice and comment rulemaking, it is not a foregone conclusion that loan officers now qualify for the administrative overtime exemption under federal law. Courts apply exemption tests on a case by case basis, considering a variety of factors including the nature of the company's business, the employee's specific duties and level of responsibility, and the manner in which the employee is paid. Exemption tests are narrowly construed, and the company bears the burden of establishing an employee qualifies for an exemption.

Fourth, to be exempt from overtime, loan officers must also meet the exemption under the law of the state in which they work. For loan officers who work in California, state law exemption tests are applied more stringently than under federal law, and they are regulated by the state's labor board rather than by the DOL.

Ultimately, while *Mortgage Bankers Association* is a welcome development, it does not conclusively settle the question of whether mortgage loan officers qualify as overtime exempt. We will continue to apprise you of significant developments as they occur.



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